



► Access to Justice: A Literature Review on Labour Courts in Europe and Latin America

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▶ Abstract

This paper is aimed at offering an overview of the bibliographical discussion on Labour Courts in Europe and Latin America, stating what specific topics academics have shown interest in. The period under review runs from 2000 to the summer of 2019 in order to incorporate the latest reforms and legislative changes in this area. The material scope is limited to procedural aspects of labour courts, including access to the courts (representation), existence of different procedures, resources and instances. For this reason, the structure followed in this report takes into account the logical sequence of the legal institutions that comprise procedural law, offering some proposals to further research in this area.

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► Introduction

This paper is aimed at offering an overview of the bibliographical discussion on Labour Courts in Europe and Latin America, **stating what specific topics academics have shown interest in.**

The origin of this paper is an assignment by LABOURLAW to study **the existing literature** related to systems for resolving individual labour conflicts, focusing on those bodies that have judicial authority on labour matters. The report should serve as an instrument to provide LABOURLAW with material on what is known about labour courts and their functioning, to develop further research on the effectiveness of labour courts in delivering access to justice. This explains the methodology followed and the orientation given to this piece.

The period under review runs from 2000 to the summer of 2019 in order to incorporate the latest reforms and legislative changes in this area. The material scope is limited to procedural aspects of labour courts, including access to the courts (representation), existence of different procedures, resources and instances. For this reason, the **structure followed in this report** takes into account the logical sequence of the legal institutions that comprise procedural law, offering some proposals for a research methodology.

The study is therefore divided into the following **sections**:

- General approaches.
- Judicial organisation.
- Access to the judicial proceedings.
- Judicial proceedings.
- Judicial review.
- Role of judges and labour courts implementing their judicial function.
- Evidence-based approach to the operation of judges and labour courts.
- Some provisional proposals for a research methodology.

Two final **warnings** are necessary. All bibliographical references are included as **footnotes** to facilitate access to specific literature, without prejudice to their inclusion in the final section, thematically arranged.

A **disclaimer** is also needed. As will be reiterated later in the conclusions, there is a certain bias in the results towards the literature of the Spanish case. This might be explained by the **methodology** used. When selecting the sources to retrieve the bibliography, we have considered the most relevant bibliometric indicators of publications in the field of Social Sciences and Humanities as indicators of excellence.¹ Among them, Latindex and SciELO, including Portuguese, Spanish and Latin American scientific production, given that relevant publications in these geographical areas do not have access to other more global indicators. The number of information sources from this geographical area is comparatively greater and scientific production in the field of labour procedural law in the Spanish case is superior to other contexts.

¹ Journal Citation Report (JCR), Scopus Sources, European Reference Index for the Humanities and the Social Sciences (ERIH Plus), Latindex, SciELO and Publishers Book Citation Index (Web of Science). Alternative indicators considered as well have been: Scholarly Publishers Indicators (SPI), Scimago Journal & Country Rank and prestigious journals included in the International Association of Labour Law Journals (IALJ), which are unlikely to appear in this kind of ranking. Other key sources of information about the subject have been analysed such as reports from state authorities in the field of justice and conference proceedings. On this last point, the documents resulting from the various annual meetings of the European Labour Court Judges (ELCJ), organised in collaboration with the ILO since 1984, are particularly valuable as they provide the vision of a major player such as the judges. The complete list of meetings as well as the proceedings and other relevant information can be found at <<https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/governance/labour-law/judges/lang--en/index.htm>> and <<http://www.oit.org/ifpdial/events/meetings/lang--en/index.htm>> (Accessed: 23/06/2020).

► 1 General approaches

This first heading is comprised of three distinct thematic clusters:

1. Broadly conceived (judicial and non-judicial) employment dispute resolution mechanisms.
2. Specific judicial instruments, including general features of national legal systems and analysis of reforms.
3. ILO's recent general essays in this field.

► Broadly conceived employment dispute resolution

A first major area of interest detected in the literature refers to **employment dispute resolution** from a **comparative perspective**. Beyond the appropriateness of this sort of methodological approach,² the collective works in the field have a markedly pan-European character, in the sense that the vast majority of national cases studied belong to this geographical area. The following cases may be referred.

Firstly, a special journal issue analysing judicial and non-judicial mechanisms to solve employment disputes, which covers eight national cases from Europe (Belgium, France, Germany and Italy) and countries from other areas (Australia, New Zealand, Japan and Brazil), offering a comparative context characterised by the geographical diversity and different logics on which conflict resolution mechanisms are built.³ The common points addressed in the different contributions are related to the similarities and differences in the process for resolving rights-based disputes depending on the source of regulation (employee statutory, constitutional, or administrative rights, on the one hand, and collective agreements or individual contract rights, on the other), the extent to which a specialised jurisdiction is used, and which non-governmental dispute resolution mechanisms can be used by the parties.⁴

² Reynoso Castillo, C., 2001. Derecho comparado del trabajo. Una aproximación a los modelos de solución de conflictos en materia laboral en el mundo. *Alegatos*, (47-48), pp. 73-80.

³ *Comparative Labor Law and Policy Journal*, 34(4). See especially the following contributions, focusing on countries belonging to the geographical areas to which this study refers:

Block, R. N. and Simmelkjaer, R. T., 2013. Introduction and Overview, pp. 737-742.

Hendrickx, F. and De Groof, S., 2013. Resolving disputes over employment rights in Belgium, pp. 743-772.

Ray, J.-E. and Rojot, J., 2013. Procedural approaches to resolving employees' rights in France, pp. 773-792.

Weiss, M., 2013. Dispute resolution in German employment and Labor Law, pp. 793-812.

Gioia, G., 2013. Labor process and Labor Alternative dispute resolution in the Italian System, pp. 813-842.

Fragale Filho, R., 2013. Resolving disputes over employment rights in Brazil, pp. 929-947.

⁴ Block, R. N. and Simmelkjaer, R. T., 2013. Introduction and Overview. *Comparative Labor Law and Policy Journal*, 34(4), pp. 737-742.

Secondly, a monograph on the study of ten national cases, including a comparative analysis of the main characteristics regarding mechanisms to solve individual broadly conceived rights disputes, including courts, arbitration bodies, administrative bodies and enforcement bodies.⁵ This comparative contribution is very significant since it provides a broad picture of the different options of organising judicial bodies and attributing competences to resolving disputes (for example, regarding the first instance, among labour courts, civil courts, or both). The European national cases studied are France, Germany, Great Britain, Ireland, Italy, The Netherlands and Sweden (plus other countries not covered by this report, such as New Zealand, South Africa and the United States).

From a **domestic perspective**, the United Kingdom's Gibbons Review should be noted,⁶ which analyses not only how employment tribunals operate and the 2004 Dispute Resolution Act, but also formulates a number of recommendations aimed at reducing the number of disputes that reach the courts. These are grouped into three areas: support employers and employees to settle more disputes in the workplace, assisting them actively to solve those disagreements that could not be solved there, and finally, creating a simpler and cheaper employment tribunals system.

► Specific judicial mechanisms: general features and analysis of reforms

National social jurisdiction regulations have also received special attention in literature from a **comparative perspective**,⁷ at times focusing on specific issues and countries,⁸ or on historical precedents and evolution.⁹ A general feature of this institution from a broad point of view of certain Ibero-American countries can be found in a collective book that analyses the entire spectrum of labour law and social

⁵ Corby, S. and Burgess, P., 2014. *Adjudicating Employment Rights. A Cross-National Approach*. Basingstoke: Palgrave Macmillan UK.

⁶ Gibbons, M., 2007. *A review of employment dispute resolution in Great Britain*. London: DTI. [pdf] Available at: <[http://217.35.77.12/CB/england/papers/pdfs/2007/2007-03_145324_G_N_1_RESOLVINGDISPUTESREV\[1\].pdf](http://217.35.77.12/CB/england/papers/pdfs/2007/2007-03_145324_G_N_1_RESOLVINGDISPUTESREV[1].pdf)> (Accessed: 04/09/2019).

⁷ Valdés Dal-Ré, F., 2000. Las jurisdicciones sociales en los países de la Unión Europea convergencias y divergencias. *Actualidad Laboral*, (1), pp. 103-117.

⁸ A comparison of the first instance in France and Spain in Ferreiro Broz, M. M., 2015. *Estudio comparatista del contencioso laboral de primera instancia francés y español*. Madrid: Dykinson.

An analysis of the main problems of the French and British labour courts in Binkert, G. and Reber, D., 2000. Gegenwartsprobleme der französischen und britischen Arbeitsgerichtsbarkeit. *Arbeit und Recht*, 48(5), pp. 63-166.

⁹ Interesting research on the creation and evolution during the 20th century of labour courts across America, including the cases of the USA, Canada, Mexico, Costa Rica, Colombia, Bolivia, Argentina, Brazil and Chile, is covered in Fink, L. and Palacio, J. M., ed. 2018. *Labour Justice across the Americas*. Urbana: University of Illinois Press.

security institutions, whose utility is to provide key points in a very summarised manner from the following countries: Argentina, Brazil, Colombia, Costa Rica, Peru, Portugal, Spain and Uruguay.¹⁰

Labour procedural law is not subject to constant periodic **reform**, unlike substantive labour law or social security law. Therefore, the adoption of new rules in the matter is explored by authors from a mainly **domestic perspective**, especially when a new procedural rule is adopted. Particularly significant are the cases of Spain, on the last major reform of 2011,¹¹ and the United Kingdom,¹² but it is also predictable from other European¹³ and Latin American cases.¹⁴ Particularly interesting is the analysis of the last major reform of the Portuguese labour judicial system imposed by the Troika, under the MoU in

¹⁰ Within the collective book (A. Baylos Grau, C. F. Thome, and R. García Schwarz, ed 2014. *Diccionario internacional de derecho del trabajo y de la seguridad social*. Valencia: Tirant lo Blanch), see namely the following contributions:

Bolaños Céspedes, F., 2014. Jurisdicción social-laboral en Costa Rica, pp. 1237–1240.

Boza Pró, G., 2014. Jurisdicción social-laboral en Perú, pp. 1257–1261.

Coelho Moreira, T. A., 2014. Jurisdicción social-laboral en Portugal, pp. 1263–1267.

García Schwarz, R., 2014. Jurisdicción social-laboral en Brasil, pp. 1225–1229.

González Herazo, E., 2014. Jurisdicción social-laboral en Colombia, pp. 1231–1235.

Mangarelli, C., 2014. Jurisdicción social-laboral en Uruguay, pp. 1269–1275.

Tascón López, M., 2014. Jurisdicción social-laboral en España, pp. 1241–1255.

Zeballos, M., 2014. Jurisdicción social-laboral en Argentina, pp. 1221–1224.

¹¹ See the introductory article to the monographic issue dedicated to the 2011 Spanish Social jurisdiction Act: Martín Valverde, A., 2013. La Ley 36/2011, reguladora de la Jurisdicción Social: caracterización general. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 15-36.

On other minor subsequent reforms: Alfonso Mellado, C. L., 2012. Reforma laboral y Ley Reguladora de la Jurisdicción Social. *Revista de Derecho Social*, (57), pp. 263-278; and Fernández-Lomana García, M., 2012. Modificaciones de la Ley de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (100) (Ejemplar dedicado a: Reforma laboral de 2012), pp. 275-298. Analysing minor reforms to previous procedural regulation: Ortega Pinto, L. T., 2010. La reforma de la Ley de procedimiento laboral por Ley 13/2009, de 3 de noviembre. *Revista General de Derecho Procesal*, (21).

¹² See, on Social Security: Jacobs, E., 2009. Something Old, Something New: The New Tribunal System. *Industrial Law Journal*, 38(4), pp. 417–423.

On changes regarding the Employment Tribunal Appeal, see:

-Burton, M., 2005. The Employment Appeal Tribunal: October 2002–July 2005. *Industrial Law Journal*, 34(4), pp. 273–283.

-Morris, G. S., 2004. Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice, *Comparative Labor Law & Policy Journal*, 25(4), pp. 477-486.

¹³ In the German case, on the new act aimed at accelerating proceedings in Labour Courts, see Appel, C. and Kaiser, B., 2000. Gesetz zur Beschleunigung des arbeitsgerichtlichen Verfahrens. *Arbeit und Recht*, 48(8), pp. 281-287.

¹⁴ On the Uruguayan reform, see Fernández, H., 2012. La reforma del proceso laboral en Uruguay. El regreso al proceso laboral autónomo. *Derecho PUCP*, (68), pp. 243-266.

On the 2002 reform in Venezuela and the implementation of orality in processes, see Bontes Calderón, I., and Mirabal Rendón, I., 2012. El rol del juez en el proceso laboral. *Paper presented at XX World Congress of Labour Law and Social Security*, Santiago de Chile, 2012 (pp. 1–20). [pdf] Available at: <<http://isssl.org/wp-content/uploads/2013/03/Venezuela-CalderonRendon.pdf>> (Accessed: 06/09/2019).

A very specific case in Argentina is analysed in Dahlgren, J. G., 2016. La justicia laboral en la provincia del Chaco. Innovaciones en el procedimiento. *Revista de La Facultad de Ciencias Económicas*, (17), pp. 131-147.

2013.¹⁵ After describing the pre-Troika organisation, the article critically explores the aims and practical consequences of the reform, as well as the details of current judicial organisation.

Singular attention to reforms from a **comparative point of view** has been paid in the Latin American context,¹⁶ including several proposals insisting on shifting from written to oral procedures, the specialisation of courts, reducing the duration of proceedings and introducing special procedures.¹⁷

The **increase of employment litigation** has been also an issue explored from a comparative point of view, taking into account very different systems, such as those in Britain, Germany and Brazil.¹⁸ Despite diverse legal traditions, they share the common feature of employment tribunals and labour courts as key elements in resolving labour disputes. The decrease in union power and more flexible employment conditions are analysed as factors that increase litigation. In the three cases, the main stages to resolve disputes over rights and the workings of labour courts and employment tribunals are considered.

The **need to reform procedural law** in general has also been the subject of specific interest in the literature, both in relation to national systems¹⁹ and to transnational spheres, such as Latin America.²⁰ There is even a study that proposes new classifications of the general theory of the process to give greater prominence to the social process.²¹

► The ILO approach

Two interesting essays must be noted with regard to the current state of knowledge at the Office. On the one hand, a report on **individual labour dispute settlement systems** that considers other institutions and mechanisms beyond labour courts.²² Some European cases (France, Germany, Spain, Sweden and the UK) are considered in a comparative perspective with countries from other regions (Australia, Canada, Japan and the United States), lacking the contrast with Latin American countries, as seen before on comparative employment dispute resolution collective analysis.²³ On the other hand, a comparative study that provides the Latin American perspective, focused on **labour jurisdictions in**

¹⁵ Dias, J. P. and Gomes, C., 2018. Judicial Reforms “Under Pressure”: The New Map/Organisation of the Portuguese Judicial System. *Utrecht Law Review*, 14(1), pp. 174-186.

¹⁶ Barbagelata, H. H., 2002. Tendencias de los procesos laborales en Iberoamérica. *Revista de la Facultad de Derecho*, (21), pp. 27-44.

¹⁷ Ciudad Reynaud, A., 2010. La modernización de la Justicia laboral en América Latina. *Justicia, Revista de Derecho Procesal*, (3-4), pp. 289-337.

¹⁸ Fragale Filho, R., 2001. Employment Litigation on the Rise – A Brazilian Perspective. Perspectives on the Litigation Explosion in Employment. *Comparative Labor Law and Policy Journal*, 22(2), pp. 281-296

Schneider, M., 2001. Perspectives on “the litigation explosion” in employment: Employment litigation on the rise? Comparing British Employment Tribunals and German Labor Courts. *Comparative Labor Law & Policy Journal*, 22(2), p. 261.

¹⁹ Aramendi Sánchez, J. P., 2009. Propuestas para reformar la Ley de Procedimiento Laboral. *Justicia laboral*, (38), pp. 51-107.

²⁰ Ciudad Reynaud, A., 2007. *Necesidad de una profunda reforma procesal laboral en América Latina*. Paper presented in the 5º Congreso de la AIJDTSSGC. [pdf] Available at: <<https://aijdtssgc.org/2007/11/necesidad-de-una-profunda-reforma-procesal-laboral-en-america-latina/>> (Accessed: 06/09/2019).

²¹ Carús Guedes, J., 2006. Direito processual social no Brasil: as primeiras linhas. *Revista Latinoamericana de Derecho Social*, (2), pp. 55-91.

²² Ebisui, M., Cooney, S. and Fenwick C., ed. 2016. *Resolving Individual Labour Disputes: A comparative overview*. Geneva: International Labour Office. [pdf] Available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488469.pdf> (Accessed: 06/09/2019).

²³ See supra. Section 01.01.

Central America,²⁴ covering the countries of Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Panama. The first part, which links effective labour justice to the idea of decent work and describes the main problems of labour courts in the region, is of particular interest.

Conference proceedings regarding mechanisms to resolve employment disputes in international organisations must also be noted.²⁵ Although a very specific issue is discussed with almost no content of interest for this study, except for a contribution relating to mediation in the field of social jurisdiction,²⁶ alongside the two aforementioned essays, thereby revealing the ILO's interest in this issue over the past decade.

²⁴ Ciudad Reynaud, A., ed. 2011. *La justicia laboral en América Central, Panamá y República Dominicana*. San José: OIT.

²⁵ Talvik, A., ed. 2015. *Best Practices in Resolving Employment Disputes in International Organizations*. Conference proceedings, ILO Geneva, 15-16 September 2014. Geneva: International Labour Office. [pdf] Available at: < https://www.ilo.org/wcmsp5/groups/public/@dgreports/@jur/documents/publication/wcms_459955.pdf>. Accessed (06/09/2019).

²⁶ Pose Vidal, S., 2015. Mediation by Labour Courts in Spain. In: Talvik, A., ed. 2015. *Best Practices in Resolving Employment Disputes in International Organizations* (pp. 19-22). Conference proceedings, ILO Geneva, 15-16 September 2014. Geneva: International Labour Office. [pdf] Available at: < https://www.ilo.org/wcmsp5/groups/public/@dgreports/@jur/documents/publication/wcms_459955.pdf>. Accessed (06/09/2019).

▶ 2 Judicial organisation

This second section contains essays on the autonomy of labour courts in relation to other jurisdictions. The following areas of interest can specifically be identified.

1. Scope of application, specialist competence and territorial jurisdiction. In particular, the delimitation with civil, administrative and commercial courts, and the application of other procedural rules.
2. International jurisdiction.
3. Organic procedural law.
4. Relations between ADR and jurisdictional mechanisms.

▶ Autonomy of labour courts

Three different general models of organising labour courts in comparative law, taking into account the matters in dispute and the courts dealing with them, have been identified:²⁷

- The integrated model is characterised by the fact that labour and social security disputes are resolved by the same courts. This is the case of Spain and Italy.
- In the dual model, there are different courts for labour litigation, on the one hand, and social security litigation, on the other hand. France and Germany are a clear example.
- In the diluted model, the same courts resolve civil, administrative, criminal and litigations on labour and social security issues. This happens in some cases in the UK (e.g. breach of contract), or the Nordic countries (e.g. at the lower instances in individual labour conflicts).

There are some interesting contributions in which literature identifying justifications to use specialist labour courts is critically examined with the aim of creating a framework to analyse the performance of courts.²⁸ The existence of an independent jurisdiction specialising in labour matters means that the bases of such **autonomy** are being studied, both in Europe and Latin America.²⁹ There are three specific areas in which the analysis has been implemented: scope of application of social jurisdiction, delimitation of the attribution of competences, and the application of common procedural rules as default regulations in absence of specific provisions.

²⁷ Arufe Varela, A., 2013. Jurisdicción social. In: A. Baylos Grau, C. F. Thome, and R. García Schwarz, ed. 2013. *Diccionario internacional de derecho del trabajo y de la seguridad social*. Valencia: Tirant lo Blanch. pp. 1216-1219.

²⁸ Davies, A. C. L., 2012. The Court of Justice as a Labour Court. *Cambridge Yearbook of European Legal Studies*, 14, pp. 145-176.

²⁹ Evju, S., 2000. Labour courts and autonomy. *Paper presented in the 8th Meeting of European Labour Court Judges*, Jerusalem, 3 September 2000. [pdf] Available at: <<http://arbetsratt.juridicum.su.se/Filer/PDF/Stein%20Evju/Labour%20courts%20and%20autonomy.pdf>> (Accessed: 26/06/2020).

Nikolaevna, and Alena, P., 2015. Conceptual problems of specialised courts system formation (case study labour justice). *European Science Review*, (7/8), pp. 163-167.

Santos Azuela, H., 2010. Derecho procesal del trabajo: principios, naturaleza, autonomía y jurisdicción. *Revista Latinoamericana de Derecho Social*, (10), pp. 239-261.

The issue of the **scope of application of social jurisdiction** (specialist competence and territorial jurisdiction) has been especially dealt with in the Uruguayan case (with the new procedural labour system introduced at the end of the last decade)³⁰ and the Spanish case (regarding the new regulation passed in 2011, which attempted to make social jurisdiction of the sphere in which all issues relating to social law were discussed).³¹

The existence of different specialised courts and the fact that certain matters relating to the labour field are adjudicated by tribunals other than labour courts gives rise to numerous studies aimed at correctly **delimiting the attribution of competences** between labour and civil, administrative, commercial and even criminal courts.

It is interesting to note the case of the UK when talking about the delimitation of competences between **civil and labour courts**. Employment disputes are resolved by two different bodies in the UK: employment tribunals (a tripartite, specialised body on claims related to statutory employment rights) and ordinary courts (on common law claims, such as breach of contract). It has been argued that recent reforms on Statutory Procedures might not adequately allow access to justice.³² On the other hand, the analysis of the evolution of Employment Tribunals reflects a tendency to approximate civil courts from a more informal body in its origin, due to coercive pressures by the government, which controls the organisation's resources, because new ET adopted the paradigm of civil courts, and also because of normative pressures derived from common values and legal training of judges in ETs and civil courts.³³

Two cases regarding the attribution of competences between **administrative and labour courts** can be found. On the one hand, certain legal systems attribute to labour administration the capacity to homologate certain agreements or decisions with collective effects. This happens in cases of collective dismissals and employment protection plans in France, where some essays can be found on the

³⁰ Garmendia Arigón, M., 2016. Materia laboral: definición del ámbito de aplicación del proceso laboral. *Revista Derecho del Trabajo*, (11), pp. 215-220.

Rossi Albert, R., 2014. Ámbito de aplicación del nuevo sistema laboral procesal. *Revista de la Facultad de Derecho*, (31), pp. 293-308.

³¹ Gil Suárez, L., 2001. Jurisdicción y Competencia. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 17-42.

López Anioarte, M. C., 2013. La ampliación del marco competencial del orden social: ¿hacia la unidad de jurisdicción? *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 37-61.

García-Atance, J. M., 2012. Las novedades competenciales de la Ley reguladora de la Jurisdicción Social. *Aranzadi Social*, 4 (10), pp. 139-165.

Pérez Gaipo, J., 2016. Apuntes sobre la evolución de la sumisión tácita en el proceso laboral. In: A. Neira Pena, dir. 2016, *Los desafíos de la justicia en la era post crisis. Proceso civil y proceso laboral*. Barcelona: Atelier. Pp. 253-263.

Tascón López, R., 2013. Competencia de jurisdicción. In: A. Baylos Grau, C. F. Thome, and R. García Schwarz, ed. 2013. *Diccionario internacional de derecho del trabajo y de la seguridad social*. Valencia: Tirant lo Blanch. pp. 239-242.

³² Morris, G. S., 2004. Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice, *Comparative Labor Law & Policy Journal*, 25(4), pp. 477-486.

³³ Corby, S. and Latreille, P. L., 2012. Employment Tribunals and the Civil Courts: Isomorphism Exemplified. *Industrial Law Journal*, 41(4), pp. 387-406.

On the Spanish case, see Roca Martínez, J. L., 2016. Proceso civil y proceso laboral. In: A. Neira Pena, dir. 2016. *Los desafíos de la justicia en la era post crisis. Proceso civil y proceso laboral*. Barcelona: Atelier. pp. 265-280.

functioning of administrative justice regarding the administration's decisions.³⁴ On the other hand, there are different statutory regulations for employees in private and public sectors. A consequence of this separation is that administrative courts have the competence to resolve employment conflicts involving certain public sector workers. This is the case of Spain, where the differences on access to justice between some public employees based on the public or private statutory applied are underlined.³⁵ Something similar happens in the UK, where exceptional employment rules govern certain relations in the public sector. The evolution of these regulations and their implications for access to justice for public employees is analysed in an article.³⁶

Finally, it must be considered that **commercial courts** in some legal systems can decide on labour issues in the context of a company in bankruptcy with respect to creditor workers. There are several studies in Spain, where the 2003 Bankruptcy Law established that commercial courts had to resolve on the employer's labour responsibilities in these cases, leading to competence problems with labour courts.³⁷ Some broader perspective essays regarding labour creditors can be found in South America,³⁸ with some minor considerations about judicial aspects.

³⁴ Specifically, on employment protection plans, see:

-Dieu, F., 2017. Le juge administratif et les décisions d'homologation ou de validation d'un PSE: un contrôle différencié selon l'objet des moyens et la situation de l'entreprise. *Revue de Droit du Travail*, (4), pp. 242-249.

-Krivine, J. and Guedes da Costa, S., 2015. Que peut-on attendre du juge administratif dans le contentieux des plans de sauvegarde de l'emploi? *Revue de Droit du Travail*, (7-8), pp. 438-445.

On the judicial control on the causes of collective dismissals see Dumortier, G., 2013. Le juge administratif face à la cessation d'activité comme motif économique. *Revue de Droit du Travail*, (6), pp. 394-400.

³⁵ García-Perrote Escartín, I., 2005. El fuero jurisdiccional del personal estatutario: paseando por el inhóspito territorio de la complejidad. *Justicia laboral*, (23), pp. 5-11.

From a broader perspective:

-González-Varas Ibáñez, S., 2002. Visión crítica de la delimitación entre la jurisdicción contencioso-administrativa y la jurisdicción social después de la Ley de la jurisdicción contencioso-administrativa de 13 de Julio de 1998. *Actualidad laboral*, (1), pp. 237-249.

-Trillo García, A. R., 2013. Coherencia y congruencia entre la vía administrativa y jurisdiccional en los procesos relativos al ejercicio de las potestades administrativas. Particularmente en procedimientos de Seguridad Social. In: A. M. Chocrón Giráldez, ed. 2013. *Buenas prácticas jurídico procesales para reducir el gasto social*. Murcia: Laborum.

³⁶ Rodgers, L., 2014. Public Employment and Access to Justice in Employment Law. *Industrial Law Journal*, 43(4), pp. 373-397.

³⁷ Fernández López, M. F., 2004. Delimitación de competencias entre el juez de lo mercantil y el juez laboral en el seno de los procedimientos concursales: los problemas sumergidos de la Ley 22/2003, concursal. *Revista de Derecho Social*, (26), pp. 21-46.

Lahuerta Bellido, M. I., 2015. La suspensión de los embargos trabados en el proceso laboral (art. 55 Ley Concursal). *Nueva Revista Española de Derecho del Trabajo*, (178), pp. 129-135.

Llorente Sánchez-Arjona, M., 2011. Efectos de la declaración del concurso sobre los contratos laborales. *Justicia, Revista de Derecho Procesal*, (3-4), pp. 275-312.

Lousada Arochena, J. F., 2004. Algunas anotaciones al artículo 64.10 de la Ley 22/2003, de 9 de julio, Concursal. *Revista de Derecho Social*, (27), pp. 65-74.

³⁸ See, in Uruguay: Dodera, J. L., 2014. Competencia de los juzgados letrados del trabajo para entender en casos de defraudación y/o simulación en perjuicio de acreedores laborales. *Revista de la Facultad de Derecho*, (23), pp. 31-38.

There is also a Chilean contribution that must be noted due to the comparative approach it adopts: Jequier Lehuedé, E., 2017. Créditos laborales y trabajadores en el procedimiento de reorganización judicial, Ley N° 20.720, *Revista Chilena de Derecho*, 44(3).

There are some contributions in Spain that reveal the need to deal with certain issues in various jurisdictions, such as corporate liability,³⁹ with a paradigmatic case that refers to different liability for occupational hazards (including criminal liability).⁴⁰

One derivative of all the above is the fact that in many cases common or **civil procedural rules apply** in the absence of labour procedural rules. Although it is a topic specially discussed in the Spanish literature.⁴¹

► International jurisdiction

The transnational provision of services, which is increasing in a globalised world, is reflected in the field of judicial dispute resolution in such a very specific matter as that of the competent jurisdiction to hear a dispute. The subject has been addressed in the bibliography from an eminently **European**

³⁹ Rubio Velasco, F., 2013. La responsabilidad del empresario: orden jurisdiccional competente. In: A. M. Chocrón Giráldez, ed. 2013. *Buenas prácticas jurídico procesales para reducir el gasto social*. Murcia: Laborum. pp. 105-114

⁴⁰ Menéndez Sebastián, P., 2018. El recargo de prestaciones y su compleja convivencia procesal con las responsabilidades penales y administrativas derivadas de accidente de Trabajo. *Revista del Ministerio de Empleo y Seguridad Social*, (138) (Monográfico: Prevención y protección de los riesgos profesionales), pp. 483-516.

Maneiro Vázquez, Y., 2018. La competencia del orden jurisdiccional social en la materia de seguridad y salud en el Trabajo. *Revista del Ministerio de Empleo y Seguridad Social*, (138) (Monográfico: Prevención y protección de los riesgos profesionales), pp. 517-546.

⁴¹ There is a vast number of essays after passing the new Code of Civil Procedure (2001):

-Azón Vilas, F. V., 2001. Algunos aspectos de la incidencia de la nueva Ley de Enjuiciamiento civil en el procedimiento laboral. *Revista de Derecho Social*, (13), pp. 71-106.

-Barrio Calle, M. A., 2000. Incidencia de la Ley de Enjuiciamiento Civil de 2000 en la ejecución regulada en la Ley de Procedimiento Laboral. *Actualidad laboral*, (3), pp. 613-632.

-Marín Correa, J. M., 2000. Breves notas en torno a la incidencia de la nueva Ley de Enjuiciamiento Civil sobre las medidas precautorias de la Ley de Procedimiento Laboral. *Actualidad laboral*, (2), pp. 495-500.

-Marín Correa, J. M., 2001. La nueva Ley de Enjuiciamiento Civil y las medidas precautorias y la ejecución provisional de sentencias en la Ley de Procedimiento Laboral. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 143-154.

-Renedo Arenal, M. A., 2016. Aplicabilidad de la Teoría General del Derecho Procesal a la rama social del mismo. In: A. Neira Pena, dir. 2016. *Los desafíos de la justicia en la era post crisis*. Proceso civil y proceso laboral. Barcelona: Atelier. pp. 231-241.

-Ríos Salmerón, B., 2000. La incidencia de la nueva Ley de Enjuiciamiento Civil en la ejecución laboral. *Revista de Derecho Social*, (10), pp. 9-42.

-Ríos Salmerón, B., 2001. La nueva Ley de Enjuiciamiento Civil y las "disposiciones de carácter general" sobre ejecución social contenidas en la Ley de Procedimientos Laboral. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 97-112.

-Valverde Arbre, A. M., 2001. Epílogo: la nueva Ley de Enjuiciamiento Civil y el proceso laboral. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 169-186.

perspective, highlighting approaches from English,⁴² French⁴³ and Spanish law,⁴⁴ remarkably with an absence of studies on Latin America.⁴⁵

► Organic procedural law

One of the key issues within this thematic block is related to an organic point of view of the social jurisdiction. It is possible to find a remarkable bibliography that analyses the **professional or lay character of labour judges**, which is a notable distinguishing feature of some legal systems. Nine EU Member States have lay judges in their labour courts representing employers and employees (Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Slovenia and the UK), resulting in “mixed courts” or “mixed tribunals”.⁴⁶ Some data on this issue related to all jurisdictions, differentiating between professional judges working full-time, professional judges sitting on an occasional basis, and non-professional judges (lay judges), are available in the Study 26 of the European Commission for the Efficiency of Justice.⁴⁷ Particularly noteworthy is the comparative study of some European cases (Germany, France and Great Britain), based on structured interviews of employer and employee lay judges and professional judges, covering issues such as how lay judges are recruited, trained and how they implement their functions.⁴⁸ A previous essay by some of its authors also covers the cases of Ireland and Sweden; beyond the main features of each of these systems, there is an interesting

⁴² Grusic, U., 2012. Jurisdiction in Employment Matters under Brussels I: A Reassessment. *International and Comparative Law Quarterly*, 61(1), pp. 91-126.

⁴³ Jault-Seseke, F., 2010. À propos. La compétence judiciaire internationale dans les rapports de travail. *Revue de Droit du Travail*, (1), pp. 63-66.

Gachi, K., 2010. L'immunité de juridiction. *Revue de Droit du Travail*, (4), pp. 218-225.

⁴⁴ Menéndez Sebastián, P., 2008. Competencia judicial y ley aplicable a un conflicto colectivo sobre cesión internacional de trabajadores. A propósito de la Sentencia del Tribunal Supremo de 20 de julio de 2007 (recurso 76/2006). *Justicia laboral*, (33), pp. 75-92.

Menéndez Sebastián, P., 2017. Competencia judicial en el contrato laboral con elemento extranjero. *Revista del Ministerio de Empleo y Seguridad Social*, (132), pp. 79-110.

Rivas Vallejo, M. P., 2007. Ley aplicable y jurisdicción competente en litigios relativos a contratos de trabajo Internacionales. *Actualidad Laboral*, (5), pp. 557-583.

⁴⁵ A very general, modest approach to the subject that indicates the different global scenarios, beyond that of the European, from an American perspective can be seen in Robertson, N. and Goodman, M., 2016. International Employment Disputes-The Next Frontier for Employers. *Employee Relations Law Journal*, 42(1), pp. 80-88.

⁴⁶ Machura, S., 2018. Research and Reports. Lay Judges at Labour Courts: A Cross-national Study. *Industrial Law Journal*, 47(3), pp. 454-457.

⁴⁷ European Commission for the Efficiency of Justice (CEPEJ). Council of Europe, 2018. European judicial systems - Efficiency and quality of justice - CEPEJ Studies No. 26. [pdf] Available at: <<https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>> (Accessed: 06/09/2019). See p.104 ff.

⁴⁸ Burgess, P., Corby, S., Höland, A., Michel, H., Willemez, L., Buchwald, C. and Krausbeck, E., 2017. The Roles, Resources and Competencies of Employee Lay Judges. A Cross-national Study of Germany, France and Great Britain. *Working Paper Forschungsförderung*, no. 051, Düsseldorf: Hans-Böckler-Stiftung, 92. [pdf] Available at: <https://www.boeckler.de/pdf/p_fofoe_WP_051_2017.pdf> (Accessed: 06/09/2019).

approach from the point of view of their legitimacy.⁴⁹ In addition, particular analyses of the French case of the *Conseils de prud'hommes* can be found.⁵⁰

A special mention should be made of the Spanish case, based on professional judges, where literature has shown interest in the organisation of the so-called judicial office, the basis for the functioning of labour courts and tribunals.⁵¹

► Relations between ADR and jurisdictional mechanisms

Given that judicial collapse is roughly a common trend in many legal systems, **ADR** is considered to be a possible solution to this problem by policymakers and academia, especially in the field of employment, which seems prone to its use.⁵² Particular interest should be paid to a comparative approach about the impact of ADR in accessing labour justice in six European countries (The Netherlands, Austria, UK, Hungary, Portugal and Turkey), focusing on its proximity to citizens in comparison with judicial courts from different perspectives and also ADR results.⁵³ Beyond its analysis in a broader framework comprising all the (judicial and non-judicial) instruments aimed at solving employment disputes seen before,⁵⁴ there are also specific issues regarding its relationship with labour proceedings.

⁴⁹ Burgess, P., Corby, S. and Latreille, P. L., 2014. Lay judges and labor courts: A question of legitimacy. *Comparative Labor Law and Policy Journal*, 35(2), pp. 191-216.

⁵⁰ Guiomard, F. 2015. Les conseils de prud'hommes, de l'élection à la désignation: un contrôle constitutionnel léger. *Revue de Droit du Travail*, (3), pp. 164-169.

Marshall, D., Lagesse, P. and Beckers, M., 2014. Réformer le conseil des prud'hommes? *Revue de Droit du Travail*, (2), pp. 85-93.

⁵¹ Pedrajas Moreno, A., 2010. Reforma del proceso laboral: la implantación de la oficina judicial y otras medidas procesales complementarias. *Actualidad laboral*, (10), p. 1.

Sánchez Álvarez, E., 2014. El encaje de los principios procedimentales del art. 74 de la Ley Reguladora de la Jurisdicción Social con la estructuración orgánica del secretario judicial y sus potestades intraprocerales. *Revista General de Derecho Procesal*, (32).

Sánchez-Pego Fernández, F. J., 2010. La dirección del proceso laboral tras la reforma de las leyes procesales de 3 de noviembre de 2009. *Justicia Laboral*, (42), pp. 13-32.

⁵² Zack, A. M., 2005. Conciliation of Labor Court Disputes. *Comparative Labor Law and Policy Journal*, 26(3), pp. 401-420.

On the Spanish case, regarding the regulation that social procedural legislation makes, see Fernández-Lomana García, M., 2013. Evitar el proceso en la Ley de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 103-126.

On aspects to assess to determine the best mechanism to use, see Carducci, G., 2012. The Importance of Legal Context and Other Considerations in Assessing the Suitability of Negotiation, Mediation, Arbitration and Litigation in Resolving Effectively Domestic and International Disputes (Employment Disputes and Beyond). *St. John's Law Review*, 86 (2 & 3) (Worlds of Work Symposium: Employment Dispute Resolution Systems Across the Globe), pp. 511-541.

⁵³ Araujo, S., Safradin, B. and Brito, L., 2019. *Comparative Report on Labour conflicts and access to justice: the impact of alternative dispute resolution*. ETHOS (EU Commission H2020 Research Project). [pdf] Available at: https://www.ethos-europe.eu/sites/default/files/docs/d6.5_website_report_complete.pdf (Accessed: 14/10/2019).

⁵⁴ See supra. Section 1.1.

On the one hand, **conciliation** has been one of the instruments mainly analysed by literature, among which a comparative essay based on sixteen national reports must be noted.⁵⁵ Conciliation is considered many times as a compulsory mechanism to use before accessing labour courts,⁵⁶ with the possibility of contesting to the court the final agreement achieved and to apply for its enforcement.⁵⁷ Furthermore, conciliation is also used as a starting point within judicial proceedings prior to its inception.⁵⁸ It is interesting to note the Mexican case, in which there was a shift from a conciliation system for employment disputes, dependent of the executive branch, to a labour courts system, dependent of the judicial branch, with prior compulsory conciliation.⁵⁹

On the other hand, **mediation** should be specially emphasised since there is a trend in literature, both in Europe (Germany, Spain or the UK) and Latin-America (Venezuela) on analysing internal mediation in labour court proceedings (“intra-judicial” mediation).⁶⁰ There are a couple of essays that should be highlighted in this field. On the one hand, an empirical analysis of judicial mediation developed by the UK’s Employment Tribunal Services on discrimination cases in 2006-2007.⁶¹ A set of mediated and un-mediated cases is compared by analysing qualitative and quantitative evidence to determine the

⁵⁵ On conciliation, from a comparative perspective, see Zack, A. M., 2005. Conciliation of Labor Court Disputes. *Comparative Labor Law and Policy Journal*, 26(3), pp. 401-420.

Araujo, S., Safradin, B. & Brito, L., 2019. Op. cit.

On the Spanish case, regarding the regulation that social procedural legislation makes, see Fernández-Lomana García, M., 2013. Evitar el proceso en la Ley de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 103-126.

On aspects to assess to determine the best mechanism to use, see Carducci, G., 2012. The Importance of Legal Context and Other Considerations in Assessing the Suitability of Negotiation, Mediation, Arbitration and Litigation in Resolving Effectively Domestic and International Disputes (Employment Disputes and Beyond). *St. John’s Law Review*, 86 (2 & 3) (Worlds of Work Symposium: Employment Dispute Resolution Systems Across the Globe), pp. 511-541.

⁵⁶ Bajo García, I., 2011. La conciliación extrajudicial en la Ley 36/2011, Reguladora de la Jurisdicción Social. *Revista de Derecho Social*, (56), pp. 43-68.

Dessi, O., 2013. L’insostenibile leggerezza della conciliazione amministrativa. *Lavoro e Diritto*, (1), pp. 82-106.

⁵⁷ Mechanisms for reviewing judicial decisions are discussed *infra*, in Section 05.

⁵⁸ Zafra Espinosa de los Monteros, R., 2010. El papel del secretario judicial en la conciliación laboral tras la reforma de la LPL. *Revista Internacional de Estudios de Derecho Procesal y Arbitraje*, (3), 24 p.

⁵⁹ Zavala Gamboa, O., 2017. Limitaciones de la conciliación en los conflictos del trabajo. Comentario a partir de la reforma al sistema de justicia laboral. *Revista Latinoamericana de Derecho Social*, (25), pp. 235-242.

⁶⁰ García Álvarez, R., 2016. Obstáculos legislativos al desarrollo de la mediación en la jurisdicción social. *Revista Icade. Revista de Las Facultades de Derecho y Ciencias Económicas y Empresariales*, (98), pp. 127-157.

Pérez Gaipo, J., 2015. Notas sobre la mediación en el proceso laboral (pp. 273-285). In: F. Bueno de Mata, dir. 2015. *Processulus: Estudios sobre Derecho Procesal*. Granada: Comares.

Renedo Juárez, M. J., 2013. Evitación del proceso y mediación intrajudicial en la jurisdicción social. *Revista Jurídica de Castilla y León*, (29) (Arbitraje y mediación: problemas actuales, retos y oportunidades), pp. 12-24.

Vanderlinder de Hernández, I. M., 2015. Análisis de la mediación en sede judicial laboral venezolana. *Telos: Revista de Estudios Interdisciplinarios en Ciencias Sociales*, 17 (1), pp. 75-95.

Pose Vidal, S., 2015. Mediation by Labour Courts in Spain. In A. Talvik, ed. 2015. *Best Practices in Resolving Employment Disputes in International Organizations* (pp. 19-22). Conference proceedings, ILO Geneva, 15-16 September 2014. Geneva: International Labour Office. [pdf] Available at: < https://www.ilo.org/wcmsp5/groups/public/@dgreports/@jur/documents/publication/wcms_459955.pdf>. Accessed (06/09/2019).

Busemann, A., 2009. Zukunft des Verfahrensrechts: Überlegungen zur gerichtlichen Mediation im arbeitsgerichtlichen Verfahren. *Arbeit Und Recht*, 57 (4), 115-119.

⁶¹ Boon, A., Urwin, P. and Karuk, V., 2011. What Difference Does it Make? Facilitative Judicial Mediation of Discrimination Cases in Employment Tribunals. *Industrial Law Journal*, 40 (1), pp. 45-81.

outcomes in both cases and the degrees of satisfaction of the different subjects involved (claimants, respondents and representatives). On the other hand, there is a document that, although not published in an indexed reference source, helps to learn about a pilot experiment of a court of first instance in Spain.⁶² After a first section defining mediation and describing the advantages of its use as opposed to the contentious process, the paper points to how the experiment was developed: the role of different actors in the process (judge, judicial office, representative of the parties, mediation team), how the mediation process works and in which cases its use is recommended.

A good indicator of the interest in these mechanisms is the special attention that the **European Labour Courts Judges** has shown in different meetings, analysing this issue from different perspectives: focusing on new forms of conflict settlement in pre-trial procedures, as well as other procedural mechanisms, conciliation and mediation,⁶³ or aiming on how Labour Courts use mediation and conciliation.⁶⁴ In addition, a later meeting, regarding the role that labour courts play in labour disputes, also included a remarkable comparative approach to the preliminary procedures for a peaceful settlement of individual labour disputes, from the point of view of the role that judges play in these mechanisms.⁶⁵

Finally, the existence of **statistical data** in this field must also be noted. The General Council of the Spanish Judiciary (CGPJ) has published a very recent specific report on mandatory ADR mechanisms prior to the labour judicial process, which helps to assess their ability to avoid judicial proceedings.⁶⁶ For instance, data on the relative annual percentage variations on individual conciliations with agreements reveals this trend has been positive in the last few years for which data is available: 2016 (3.7), 2017 (1.7) and 2018 (7.7). But beyond this, there is a great deal of other interesting data such as individual conciliations completed with agreed amounts and average amounts, according to reason and type of resolution, or individual conciliations completed according to the reason for the dispute and to sector and division of activity or to autonomous communities and provinces. Similar statistics are offered as well by the Guatemalan Judicial Career Council⁶⁷ in relation to alternative ways of terminating the process, even though they do not contain such rich and specific data as in the Spanish case. It provides absolute data according to courts and territories.

⁶² Ilustre Colegio de la Abogacía de Bizkaia, 2010. *Mediación intrajudicial en la jurisdicción social*. [pdf] Available at: <<http://www.icasv-bilbao.com/images/comisiones/MediacoionJurisdSocial.pdf>> (Accessed: 06/09/2019).

⁶³ Kuras, G., 2003. *General Report. New Initiatives to make Labour Courts Hearings more efficient: use of alternative disputes methods, collective (class) action*. XIth Meeting of European Labour Court Judges. [pdf] Available at: <http://www.oit.org/wcm5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_160068.pdf> [Accessed: 23/06/2020].

⁶⁴ Zack, A., 2005. *General Report. Theme 2 – The Use of Mediation/Conciliation by Labour Courts*. XIIIth Meeting of European Labour Court Judges. [pdf] Available at: <http://www.oit.org/ifpdial/events/meetings/WCMS_189533/lang--en/index.htm> [Accessed: 23/06/2020]. See also supra. Footnote 26.

⁶⁵ Blaha, M. et al., 2012. *General and National Reports. Topic 2 - The role of the Court in a labour dispute*. XXth Meeting of European Labour Court Judges. [pdf] Available at: <https://www.ilo.org/wcm5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_194726.pdf> [Accessed: 23/06/2020].

⁶⁶ Consejo General del Poder Judicial Español, Sección de estadística judicial, 2019. Estadística de Mediación, arbitraje y conciliación laboral 2018. [Online] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/14001E%20Mediacion%20Arbitraje%20y%20Conciliacion%20Laborales/A%C3%B1os%20Anteriores/Estad%C3%ADstica%20de%20Mediacion,%20Arbitraje%20y%20Conciliaci%C3%B3n%20Laboral%202018.xlsx>> (Accessed: 06/09/2019).

⁶⁷ Consejo de la Carrera Judicial de Guatemala, Centro de Información, desarrollo y estadísticas, 2019. Estadísticas e indicadores judiciales, Vías alternativas período 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/vias%20alternas%20de%20terminacion.pdf>> (Accessed: 06/09/2019).

▶ 3 Access to judicial proceedings

Among several aspects that could be dealt with under this heading,⁶⁸ we have considered it opportune to focus on the following:

1. Pre-judicial proceeding step.
2. Legal standing (active and passive legal capacity).
3. Legal aid and court fees.
4. Protection of vulnerable groups.
5. Effective judicial protection.

▶ Pre-judicial proceeding step

Some legal systems require the fulfilment of formalities prior to accessing the process, beyond an attempt at conciliation, as noted above.⁶⁹ This is the case in Spain, where in order to sue a public administration before the labour courts, it was generally necessary **to exhaust the previous administrative channels**, a field on which some contributions have been written.⁷⁰

▶ Legal standing

⁶⁸ A synthetic account of what can be understood by access to justice in Bezerra Leite, C. H., 2013. Acceso a la justicia. In: A. Baylos Grau, C. F. Thome, and R. García Schwarz, ed. 2013. *Diccionario internacional de derecho del trabajo y de la seguridad social*. Valencia: Tirant lo Blanch. pp. 31-37

⁶⁹ See supra. Section 02.04.

⁷⁰ Hernández Vitoria, M. J., 2016. Trámites preprocesales en el ejercicio de acciones judiciales contra órganos públicos en el proceso laboral. *Revista de Información Laboral*, (2), pp. 19-40.

Nores Torres, L. E. and Esteve Segarra, M. A., 2018. El agotamiento de la vía administrativa previa en el orden social. *Trabajo y Derecho*, (42), pp. 126-142.

Rosa Moreno, J., 2017. El agotamiento de la vía administrativa como presupuesto para el control judicial de los actos administrativos de naturaleza laboral. *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 5(3), pp. 222-245.

On classical issues such as legal capacity, legal standing or representation in legal proceedings, specific essays have been found **only in the Spanish case**,⁷¹ without prejudice to being treated contextually in connection with different topics in other publications.

There are very interesting **judicial statistics** of European countries in the aforementioned Study 26 of the European Commission for the Efficiency of Justice, on monopoly of lawyers for legal representation, distinguishing among first, second and highest instance, and including data on other organisations of persons that may represent a client before court (among which self-representation and trade union representation may be underlined).⁷²

There are few scientific productions specifically focused on legal representation before courts. In both cases, it refers to the **European context**: Germany⁷³ and Spain.⁷⁴ It is worth noting that in the Spanish case, representation is optional in instance and can be done by a lawyer or social graduate.

► Legal aid and court fees

An important aspect for the right of access to proceedings is the existence of judicial fees, which is treated along with the question of free justice.⁷⁵ It is evident that the eventual costs of the process for the parties may dissuade many people from requesting the services of labour courts, particularly those in a more precarious economic situation. Despite the fact that exemptions from paying legal fees are common in most European states,⁷⁶ there are some cases in which its introduction on labour issues

⁷¹ Arias Domínguez, A., 2013. Novedades de la LJS en relación a las partes, acumulaciones (de acciones y procesos), y actos y resoluciones procesales. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 63-101.

García-Perrote Escartín, I. and Mercader Uguina, J. R., 2005. La legitimación procesal del sindicato en la reciente jurisprudencia constitucional. *Justicia laboral*, (22), pp. 5-12.

Iglesias Cabero, M., 2001. Las partes del proceso (capacidad, postulación y legitimación). *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 43-56.

⁷² European Commission for the Efficiency of Justice (CEPEJ). Council of Europe, 2018. Op. cit., p. 176 ff.

⁷³ Grotmann-Höfling, G., 2009. Vertretung vor den Gerichten für Arbeitssachen. *Arbeit Und Recht*, 57(11/12), pp. 392–395.

⁷⁴ Pérez del Blanco, G., 2009. La “representación técnica” por graduado social en España tras la Ley 13/2009 de la Oficina Judicial. *Revista Internacional de Estudios de Derecho Procesal y Arbitraje*, (1), 19 p.

⁷⁵ There is only a specific essay on legal aid in Spain. See Álvarez Cortés, J. C., 2001. El principio de gratuidad en el proceso laboral: su dimensión constitucional y los problemas derivados de la aplicación de la Ley de Asistencia Jurídica Gratuita. *Revista de Derecho Social*, (14), pp. 101-120.

⁷⁶ European Commission for the Efficiency of Justice (CEPEJ). Council of Europe, 2018. Op. cit., p. 64.

has been a matter of analysis. A great deal of literature has been produced on **legal fees in Spain**,⁷⁷ due to their inclusion in the labour process, which generated much controversy in the academy. It has been greatly covered in the **UK**, related to the relevant Unison case on labour and constitutional law issues,⁷⁸ and empirical studies on the costs of employment tribunals.⁷⁹

Judicial statistics in this field and very detailed information on legal aid can be also retrieved from the Study 26 of the European Commission for the Efficiency of Justice, within the broader context of budgets of judicial systems and without offering disaggregated data by jurisdiction.⁸⁰

► Protection of vulnerable groups

We believe that it is particularly interesting within this section the trend noted in the literature, both in Europe and Latin America, to be concerned in analysing the rights of certain vulnerable groups, particularly **migrant workers**. There are some interesting case studies in this field in the **UK and Costa Rica**.

- In the former, the analysis is on how migrant workers from the EU-8 States (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia), who mostly work in low-skilled, low-paid jobs, make use of Employment Tribunals (ETs) to enforce their employment

⁷⁷ Chocrón Giráldez, A. M., 2013. Problemas derivados de la aplicación de las tasas judiciales en el orden jurisdiccional social: de la expansión a la exención. In: A. M. Chocrón Giráldez, ed. 2013. *Buenas prácticas jurídico procesales para reducir el gasto social*. Murcia: Laborum. pp. 115-126

Marín Correa, J. M., 2012. Tasas judiciales en el Orden Social de la Jurisdicción (1): (Primeras observaciones sobre la Ley 10/2012 de 20 de noviembre. BOE 21 noviembre). *Actualidad laboral*, (21-22), p. 8.

Marín Correa, J. M., 2013. Tasas judiciales en el procedimiento laboral (1): (Ley 10/2012, de 20 de noviembre, por la que se regulan determinadas tasas en el ámbito de la Administración de Justicia y del Instituto Nacional de Toxicología y Ciencias Forenses. BOE del día 21 de noviembre). *Actualidad laboral*, (3), p. 8.

Morales Váñez, C. E., 2013. Las tasas judiciales en el Orden Jurisdiccional Social. *Actualidad laboral*, (7), p. 1.

Urrutikoetxea Barrutia, M., 2013. Tasas en el orden social: ¿el fin de la justicia gratuita de los trabajadores? *Revista de Derecho Social*, (63), pp. 57-72.

⁷⁸ Bogg, A., 2018. The Common Law Constitution at Work: R (on the application of UNISON v Lord Chancellor. *Modern Law Review*, 81(3), pp. 509-526.

Busby, N., 2015. Challenging Employment Tribunal Fees: R (Unison) v Lord Chancellor and another (No. 2). *Edinburgh Law Review*, 19(2), pp. 254-259

Ford, M., 2018. Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court. *Industrial Law Journal*, 47(1), pp. 1-45.

⁷⁹ IFF Research, 2013. *Payment of Tribunal Awards*. London: BIS.

Mangan, D., 2014. Assessing Employment Tribunal Awards. *Industrial Law Journal*, 43(2), pp. 212-217.

⁸⁰ European Commission for the Efficiency of Justice (CEPEJ). Council of Europe, 2018. Op. cit., p. 63 ff. (on court fees), and p. 71 ff. (on legal aid).

rights.⁸¹ A very specific case study on migrant domestic workers working in diplomatic households must also be noted.⁸²

- In the latter, some judicial best practices in this field in Costa Rica are analysed, bearing in mind that this is a country that receives significant migratory flows, especially of Ngobe natives from Panama and Nicaragua.⁸³

Within the **Latin American context**, the Ibero-American Judicial Summit (*Cumbre Judicial Iberoamericana*) has published highly relevant documents that deserve to be mentioned with regard to this point. Among the so-called axiological products of the Summit, the Charter of the Rights of Persons before Justice (*Carta de derechos de las personas ante la justicia*) is notable,⁸⁴ highlighted by the points related to protection of victims (23-26), protection of members of indigenous populations (27) and protection of people with disabilities (31-34). Some of these greatly affect the social jurisdiction. Above all, the specific protocols for action in relation to **certain groups of special vulnerability** must be mentioned: foreigners, women and minors.⁸⁵ Two reports of the Federal Judiciary Council of Mexico (*Consejo de la Judicatura Federal de México*) can be cited in this section: the first is related to the incidence of unemployment on the increase of judicial cases, disaggregated by jurisdictions and from a quantitative point of view, with data from 2003-2010;⁸⁶ the second is focused on the incidence of variations of populations from a gender point of view on the increase of judicial cases.⁸⁷

► Effective judicial protection

The last point of this section includes works dedicated to the right to effective judicial protection in the social jurisdiction,⁸⁸ and to a specific aspect of this fundamental right: the indemnity bond. It could not be otherwise, given that it is one of the main manifestations of the right to due process in the social order.

⁸¹ Barnard, C. and Ludlow, A., 2016. Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals. *Industrial Law Journal*, 45(1), pp. 1–28.

Barnard, C., Ludlow, A. and Fraser Butlin, S., 2018. Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers. *Industrial Law Journal*, 47(2), pp. 226–262.

⁸² Murphy, C., 2013. Researching Barriers to Access to Justice for Migrant Domestic Workers in Diplomatic Households. *Industrial Law Journal*, 42(4), pp. 447–453

⁸³ Hidalgo, A., 2016. El acceso a la justicia laboral de las personas trabajadoras migrantes nicaragüenses en Costa Rica. *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 4(3), pp. 30–47.

⁸⁴ Cumbre Judicial Iberoamericana, Secretaría permanente, 2014. *Carta de derechos de las personas ante la justicia*. [pdf] Available at <<http://www.cumbrejudicial.org/productos-y-resultados/productos-axiologicos/download/31/32/15>> (Last access: 23-09-2019, 09:30h).

⁸⁵ Cumbre Judicial Iberoamericana, Secretaría permanente, 2014. *Protocolo Iberoamericano de actuación judicial para mejorar el acceso a la justicia de personas con discapacidad, migrantes, niñas, niños, adolescentes, comunidades y pueblos indígenas, surgido de la XVII Cumbre judicial Iberoamericana*. [pdf] Available at: <<http://www.cumbrejudicial.org/productos-y-resultados/productos-axiologicos/download/38/38/15>> (Accessed: 06/09/2019).

Cumbre Judicial Iberoamericana, Secretaría permanente, 2014. Protocolo de Actuación judicial para casos de violencia de género contra mujeres, surgido de la XVII Cumbre Judicial Iberoamericana. [pdf] Available at: <<http://www.cumbrejudicial.org/productos-y-resultados/productos-axiologicos/download/39/38/15>> (Accessed: 06/09/2019).

⁸⁶ Consejo de la Judicatura Federal de México, Dirección General de Estadística y Planeación Judicial, 2010. *Justicia Federal y desempleo 2003-2010*. [pdf] Available in <https://www.dgepj.cjf.gob.mx/resources/justiciafederal/JFYD0307.pdf> (Last access: 04-09-2019, 17:20h).

⁸⁷ Consejo de la Judicatura Federal de México, Dirección General de Estadística y Planeación Judicial, 2011. *Justicia Federal y género 2003-2010*. [pdf] Available in <https://www.dgepj.cjf.gob.mx/resources/justiciafederal/JFYG0307.pdf> (Last access: 04-09-2019, 17:27h).

⁸⁸ This issue is also considered within the analysis of principles of the labour process. See infra. Section 04.01.

Despite this being a subject studied **mainly by European academics**, there are some Latin American essays that are noteworthy.⁸⁹ Thus, Polish,⁹⁰ French⁹¹ and Italian sources can be cited.⁹² Singular reference should be made to the Spanish case, not only with respect to the analysis of the right to effective judicial protection,⁹³ but also to its eminently labour manifestation as the guarantee of indemnity,⁹⁴ which may be due to its recognition as a fundamental right in the Constitution.

⁸⁹ There is an empirical and descriptive essay on the Colombian case, which must be noted: Berrocal Durán, J. C., 2016. Igualdad material de las partes en el proceso laboral: audiencias, conciliación y primera de trámite. *Justicia Juris*, 21(30), pp. 122-131.

⁹⁰ Baran, K. W., 2016. Right to a fair trial in labour disputes in the light of the Polish Constitution. *Studies on Labour Law and Social Policy*, 23, pp. 437-445.

⁹¹ Gratton, L. and Leclerc, O., 2014. Action en justice et mesures de rétorsion. *Revue de Droit du Travail*, (5), pp. 321-329.

⁹² Pisani, A. P., 2014. Riflessioni critiche sulla cosiddetta tutela giurisdizionale differenziata. *Lavoro e Diritto*, (2-3), pp. 537-546.

⁹³ Blasco Pellicer, A., 2000. Proceso laboral y efectividad de la tutela judicial. *Revista de Derecho Social*, (12), pp. 35-70.

Martín Valverde, A., 2014. Los derechos a tutela judicial efectiva y a un proceso equitativo en la jurisdicción social: incidencia de la crisis económica. *Relaciones Laborales*, (11), pp. 19-39.

Gil Plana, J., 2014. El derecho a la tutela judicial efectiva y el acceso al proceso laboral. *Revista del Ministerio de Empleo y Seguridad Social*, (108), pp. 381-422.

⁹⁴ García-Perrote Escartín, I. and Mercader Uguina, J. R., 2004. Las nuevas dimensiones de la denominada garantía de indemnidad. *Justicia laboral*, (20), pp. 5-12.

García-Perrote Escartín, I. and Mercader Uguina, J. R., 2010. La extensión refleja de la garantía de indemnidad a los trabajadores de contratas y subcontratas por actos de la empresa principal: los ecos del caso "Samoa". *Justicia laboral*, (44), pp. 5-9.

Valle Muñoz, F. A., 2005. La garantía de indemnidad del trabajador por ejercitar acciones judiciales contra el empresario. *Revista de Derecho Social*, (29), pp. 79-118.

► 4 Judicial proceedings

This section includes literature on labour proceedings from start to finish, from the lawsuit to the enforcement of the ruling. There are some contributions describing the ordinary proceedings in a given State, such as Spain,⁹⁵ or some Latin American countries, such as Uruguay,⁹⁶ Mexico⁹⁷ or Brazil,⁹⁸ as well as some considerations regarding the development of the process, as in Italy⁹⁹ and France.¹⁰⁰ Additionally, an interesting contribution from the perspective of forensic practice, also in the Spanish case, should be mentioned.¹⁰¹ The large number of pieces included deal with more specific aspects, such as:

1. Principles of labour proceedings, especially orality.
2. Digital technology applied to labour proceedings.
3. Legal action or lawsuit before social jurisdiction (parties' submissions).
4. Precautionary measures.
5. Evidence and means of evidence.
6. Final proceedings and judgement.
7. Provisional and final enforcement of ruling.
8. Procedural arrangements.

► Principles of labour proceedings

As is well known, the founding principles of labour law differ from private law in the fact that they consider the material inequality of the parties. Thus, labour law stands as a protective regulation of the weaker party: the worker. Something similar happens with labour procedural law, with some essays focusing on assessing whether the principle of favourability may be applicable also in the proceedings, or principles of equality, and legal certainty should prevail.¹⁰² This comparative analysis of the cases of Venezuela, Mexico, Chile and Argentina, from the Colombian perspective, also includes a very interesting chapter regarding Latin American trends in labour procedural law.

⁹⁵ Luján Alcaraz, J., 2013. Novedades en la regulación del proceso ordinario en la Ley de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 127-156.

⁹⁶ Larrañaga Zeñi, N., 2015. El proceso laboral ordinario uruguayo. *Revista CADE: Doctrina y Jurisprudencia*, (33), pp. 21-34.

⁹⁷ Ramírez Juárez, C. L., 2012. El procedimiento ordinario laboral en la Ley Federal del Trabajo. *Revista Latinoamericana de Derecho Social*, (14).

⁹⁸ Russomano, M. V., 2011. Procedimientos Laborales. *Revista Latinoamericana de Derecho Social*, (13).

⁹⁹ Romei, R., 2014. Il processo del lavoro tra vecchi e nuovi riti: ovvero quale processo si celebra nelle aule di giustizia. *Lavoro e Diritto*, (2-3), pp. 553-564.

¹⁰⁰ Véricel, M., 2012. Le procès des délais de procédure prud'homale: 471. *Revue de Droit du Travail*, (9), pp. 471-478.

¹⁰¹ Aramendi Sánchez, J. P., 2015. Los errores más habituales de los profesionales en el juicio laboral. *Trabajo y Derecho*, (9), pp. 142-148.

¹⁰² Meza Yances, L., 2017. Favorabilidad en el derecho procesal del trabajo: aplicación estricta o ilimitada. *Estudios Socio-Jurídicos*, 19(2), pp. 197-220

Principles of labour proceedings have been the subject of special interest mainly by Spanish¹⁰³ and Latin American literature. In this latter context, there are different essays that should be mentioned. A contribution focused on the principles of transparency, balance of parties in the process, prompt justice and effective judicial protection in Central America and the Dominican Republic, paying special attention to case law from the Inter-American Court of Human Rights,¹⁰⁴ an analysis of the new labour processes created in Uruguay, following the 2009 reform, and its underlying principles.¹⁰⁵ The principle of orality is one of the most common within labour proceedings, provided that it facilitates the exercise of judicial actions and can be seen as a measure that takes into account the inequality of parties in the economic field noted above. However, despite being established by law, it is often not fulfilled in practice, as the Mexican case shows, with an analysis on the causes in a broader framework of all the specific principles applicable to labour and social security processes.¹⁰⁶ At other times, legal reforms are aimed to promote its use, such in the Colombian case, where a brief contribution gives the main characteristics of the 2007 reform.¹⁰⁷ From a practical point of view, there are various reports on the **implementation of orality in the labour proceedings** carried out by the Superior Council of the Judiciary of Colombia (*Consejo Superior de la Judicatura de Colombia*) related to different cities (Bucaramanga, Bogotá, Cali and Medellín).¹⁰⁸

► Digitalisation of labour proceedings

The high workload of labour courts is a common problem in many European and Latin American countries. The search for instruments to shorten the time taken to resolve disputes motivates many legal reforms and the introduction of specific mechanisms. The **Venezuelan case** is particularly interesting in this context with the **introduction of digital systems**, with an analysis of its "Juris 2000" model,¹⁰⁹ which has decongested and accelerated courts proceedings. The use of **digital notifications** is taking place in many jurisdictions, although the doctrine has not shown great interest in the labour field.¹¹⁰

¹⁰³ González Biedma, E., 2015. "Buenas prácticas" y crisis de los principios del proceso. In: M. D. Ramírez Bendala, ed. 2015. *Buenas prácticas jurídico procesales para reducir el gasto social* (III). Murcia: Laborum. pp. 239-253.

Marín Correa, J. M., 2010. Los principios de aplicación del proceso de Trabajo. *Revista del Ministerio de Trabajo e Inmigración*, (88), pp. 31-40.

Valle Muñoz, F. A., 2014. La vigencia del principio "pro actione" en el proceso laboral. *Revista de Derecho Social*, (66), pp. 59-80.

¹⁰⁴ Bolaños Céspedes, F., 2012. Acceso a justicia laboral en Centroamérica. *Derecho PUCP*, 68, pp. 267-284.

¹⁰⁵ Gauthier, G., 2013. Los principios del proceso laboral y los principios que rigen los nuevos procesos laborales en Uruguay. *Meritum: Revista de Direito Da Universidade FUMEC*, 8(1), pp. 143-177.

See also Goldstein, E., 2014. El reconocimiento expreso de los principios en el novel proceso laboral de la República Oriental del Uruguay, *Revista Derecho del Trabajo*, (2), pp. 263-267

¹⁰⁶ Ruiz Moreno, A. G., 2010. Principios procesales necesarios en la administración de justicia en asuntos laborales y por prestaciones de la seguridad social en México. *Revista Latinoamericana de Derecho Social*, (10), pp. 203-238.

¹⁰⁷ Blanco Rivera, O. A., 2008. La Ley de Impulso a la Oralidad en el Proceso Laboral Colombiano. *Revista Latinoamericana de Derecho Social*, (7).

¹⁰⁸ Consejo Superior de la Judicatura de Colombia, 2005. *Memorias sobre implementación de la oralidad en el proceso laboral*. [Online] Available at: <<https://www.ramajudicial.gov.co/portal/informacion/implementacion-oralidad-laboral/memorias>> (Accessed: 06/09/2019).

¹⁰⁹ Bencomo Escobar, T., 2010. Tecnología digital en la administración de justicia laboral venezolana. *Revista Latinoamericana de Derecho Social*, (10), pp. 39-63.

¹¹⁰ A very brief analysis of the issue at European level: Sancho León, A., 2018. Notificaciones electrónicas: ¿una nueva fórmula para constituir relaciones jurídico procesales? *Trabajo y Derecho*, (43-44), pp. 140-142.

► Parties' submission

In both the European and Latin American contexts, studies can be found on a number of **particular issues** around this topic. Thus, on the increase and substantial variation of the claim,¹¹¹ claimant withdrawal,¹¹² accumulation of actions,¹¹³ reply to claim,¹¹⁴ prescription period,¹¹⁵ or determination of the amount in dispute and complaints,¹¹⁶ and eventual procedural interests,¹¹⁷ which in both cases depends on the court that finally decides it. From a forensic perspective, considering that many proceedings are based on the orality principle, a contribution on how parties should conclude their arguments before the courts should be mentioned.¹¹⁸

► Protective measures

Precautionary measures are an essential procedural law institution, since they often have a direct impact on the effectiveness of the future judgment. This also happens in the labour process and has been

¹¹¹ Arufe Varela, A., 2001. La ampliación de la demanda en el proceso laboral. *Actualidad laboral*, (47), pp. 843-860.

García Salas, A. I., 2011. Ampliación de la demanda y variación sustancial en el proceso laboral. *Justicia laboral*, (47), pp. 77-113.

¹¹² Arufe Varela, A., 2005. La precaria y problemática regulación del desistimiento del demandante en la Ley de Procedimiento Laboral: una reforma inaplazable. *Actualidad laboral*, (2), pp. 1891-1898.

¹¹³ Chocrón Giráldez, A. M., 2014. El ejercicio acumulado de acciones en el proceso laboral. Una apuesta por la economía procesal. In: E. Roales Paniagua, ed. 2014. *Buenas prácticas jurídico procesales para reducir el gasto social (II)*. Murcia: Laborum. pp. 137-151.

Rodríguez Pastor, G. E., 2007. La acumulación de pretensiones (I). *Actualidad laboral*, (11), pp. 1366-1375.

Rodríguez Pastor, G. E., 2007. La acumulación de pretensiones (y II). *Actualidad laboral*, (12), pp. 1492-1503.

¹¹⁴ On the Spanish case, see Moliner Tamborero, G., 2001. Demanda, contestación y periodo intermedio. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 57-82.

The topic in Peru is treated in Vinatea Recoba, L., 2014. Los alegatos en el nuevo proceso laboral. *Themis: Revista de Derecho*, (65), pp. 123-132.

On the consequences of non-replying to the claim in Chile, see Fernández Toledo, R., 2017. La admisión tácita de los hechos por no contestación de la demanda en el proceso laboral. *Revista Chilena de Derecho Privado*, (28), pp. 91-136.

A very specific issue in Poland can be found at Malczyk, M., 2017. Substantive amendment of the defendant's claim (bringing a third party action) in cases with the employee's action. *Studies on Labour Law and Social Policy*, 24(4), pp. 303-312.

¹¹⁵ Toledo Filho, M. C., 2014. Prescripción de acciones laborales: Cuestiones de fondo y forma. *Revista Latinoamericana de Derecho Social*, (18).

¹¹⁶ Ulrici, B., 2008. Prozesspraxis: Streitwertfestsetzung und Beschwer. *Arbeit Und Recht*, 56(11), pp. 384-387.

¹¹⁷ González Calvet, J., and Blanch Domeque, M. R., 2016. *Los intereses procesales en la jurisdicción social*. Albacete: Bomarzo.

Gualda Alcalá, F. J., 2000. El pago de intereses en el proceso laboral. *Revista de Derecho Social*, (9), pp. 69-90.

¹¹⁸ Bodas Martín, R., 2018. El mapa de conclusiones en el proceso laboral: el arte de concluir. *Trabajo y Derecho*, (40), pp. 130-138.

the subject of some interest in academia, focusing primarily on **Latin America** (Brazil,¹¹⁹ Chile¹²⁰ and Colombia¹²¹), as well as an extensive contribution to **Spanish regulation**.¹²²

► Issues relating the proof

This area has been **extensively studied by Spanish doctrine**, without prejudice to any particular study in the rest of Europe,¹²³ and Latin America.¹²⁴ Not only their **general study**,¹²⁵ but also **particular classical proof instruments**, such as written evidence,¹²⁶ recording proof¹²⁷ or hearing of witnesses and experts.¹²⁸ Beyond the above, there is a set of particular areas in which more academic work has been done.

The **proof of specific issues such as oral dismissal**,¹²⁹ or very especially the **infringement of fundamental rights**,¹³⁰ in particular cases of discrimination¹³¹ or sexual and moral harassment.¹³² As this later paper shows, general rules applicable in the social proceedings are not adequate to prove the

¹¹⁹ Toledo Filho, M. C., 2015. Las medidas cautelares en el proceso laboral brasileño. *Revista Derecho del Trabajo*, (6), pp. 185-190.

¹²⁰ Ruay Sáez, F. A., 2015. La "función" cautelar del juez en el proceso laboral: ¿Consagración de una potestad cautelar genérica? *Ius et Praxis*, 21(2), pp. 441-480.

¹²¹ León Moreno, E. N. and Mayorga Camacho, J. M., 2017. Las cautelas innominadas en el proceso laboral colombiano: Instrumento de la tutela jurisdiccional efectiva. *Revista del Instituto Colombiano de Derecho Procesal*, (46), pp. 205-228.

¹²² Alemañ Cano, J., 2014. *Actos preparatorios, prueba anticipada y medidas cautelares en el proceso laboral*. Albacete: Bomarzo.

¹²³ For instance, in France, see Henriot, P., 2018. Le droit à la preuve, au service de l'égalité des armes. *Revue de Droit du Travail*, (2), pp. 120-124

¹²⁴ Utman Suárez, F. 2011. Oportunidades probatorias no reglamentadas explícitamente en los nuevos procedimientos laborales. *Revista Chilena de Derecho*, 38 (3), 639-644.

¹²⁵ Botana López, J. M. (2001). Prueba y diligencias para mejor proveer. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 83-96.

González Cano, M. I. and Romero Pradas, M. I., ed. 2017. *La Prueba en el proceso laboral (Tomo IV)*. Valencia: Tirant lo Blanch.

Preciado Domènech, C. H. and Purcalla Bonilla, M. A., 2015. *La prueba en el proceso social*. Pampona: Aranzadi.

¹²⁶ Segalés Fidalgo, J., 2002. Prueba documental y proceso de trabajo: apuntes para una reforma de la LPL. *Revista de Derecho Social*, (18), pp. 55-72.

¹²⁷ Frago Amada, J. A., 2013. Las grabaciones privadas ante la jurisdicción social. *Actualidad Jurídica Aranzadi*, (864), p. 10.

¹²⁸ Lafuente Suárez, J. L., 2004. La prueba de interrogatorio de parte persona jurídica en el proceso laboral. *Actualidad laboral*, (4), pp. 408-416.

Vizcaíno Casas, F., 2000. La prueba de testigos y la pericial en el proceso laboral. *Actualidad laboral*, (3), pp. 587-611.

¹²⁹ Marín Correa, J. M., 2002. La prueba de la existencia de despido verbal. *Actualidad laboral*, (1), pp. 691-692.

¹³⁰ Villalba Salvador, B., 2001. La prueba en los procedimientos de tutela de derechos fundamentales. *Revista de Derecho Social*, (13), pp. 183-192.

See related issues, such as procedural arrangements (infra Section 04.08); relations between labour ordinary courts and constitutional courts through the possibility of judicial review (infra Section 05), and the role of ordinary and constitutional courts recognising workers' fundamental rights (infra Section 06).

¹³¹ Lousada Arochena, J. F., 2005. La jurisprudencia constitucional sobre la prueba de la discriminación y de la lesión de derechos fundamentales. *Revista de Derecho Social*, (30), pp. 35-54.

¹³² Lousada Arochena, J. F., 2016. La prueba de la discriminación, la lesión de derechos fundamentales y el acoso sexual y moral en el proceso laboral español. *Revista de Trabajo y Seguridad Social*, (400), pp. 17-46.

infringement of the fundamental right, due to the different forms that it can adopt, and which is usually concealed under seemingly neutral behaviour. For this reason, legal measures to provide the proof (reversal of the burden of the proof) and case law techniques (the use of statistical data to prove indirect discrimination, special consideration to the victim's statement in cases of moral harassment) are analysed. Indirect discrimination has been also analysed by UK literature,¹³³ focusing on the different approach that the UK courts have to the concept of proportionality compared with other EU countries, and the CJEU, which has as a consequence a significant disadvantage for the claimant.

The **evidence of foreign law** in labour proceedings has also been extensively discussed, given that it goes beyond the application of the principle *iura novit curia*.¹³⁴

Studies relating to **presumptions** applicable in the proceedings,¹³⁵ or **burden of proof**.¹³⁶ In this last aspect, there is a particularly interesting contribution of which two aspects should be highlighted. On the one hand, because the Spanish case is analysed in a comparative perspective, considering how France, Belgium, the Netherlands, Italy, Poland, Germany and Switzerland treat this issue. On the other hand, because the focus is put in a persuasive argument, the general rule (also in labour courts) is that the claimant must prove the alleged facts, which is often not easy in this jurisdiction, highlighting techniques such as reversal of the burden of the proof in some cases, or by providing presumptions, or prima facie evidence.¹³⁷ This possibility of overturning the rules of evidence in cases of unfair dismissals has been also studied in the Italian case.¹³⁸

There are also different essays on the **evaluation of proof** by labour courts and **unlawful evidence**.¹³⁹ A very unusual piece of research can be cited, considering the specific issue analysed. It discusses the consequences of unlawful evidence in case of dismissal, claiming a different application of the legal provision that leads to consider the dismissal as invalid (direct reintegration in the firm), and not unfair (in which case, the employer can choose between reincorporating the employee or terminating the contract with the corresponding compensation).¹⁴⁰

Finally, a set of contributions on a highly relevant issue today, such as **electronic or digital evidence**. The most important cases analysed are related to the use of information obtained by controlling digital

¹³³ Lane, J. A. & Ingleby, R., 2018. Indirect Discrimination, Justification and Proportionality: Are UK Claimants at a Disadvantage? *Industrial Law Journal*, 47(4), pp. 531-552.

¹³⁴ Carrillo Pozo, L. F., 2006. El derecho extranjero en el proceso de Trabajo. *Revista del Ministerio de Trabajo e Inmigración*, (62), pp. 13-58.

Gómez Jiménez, J. M., 2015. La falta de prueba del derecho extranjero en el proceso laboral contemporáneo. *Nueva Revista Española de Derecho del Trabajo*, (173), pp. 255-272.

Gil Suárez, L., 2007. La aplicación y prueba del Derecho extranjero en la jurisdicción social. *Actualidad laboral*, (17), pp. 2036-2058.

¹³⁵ Gil Plana, J., 2006. Las presunciones jurídicas en el ordenamiento jurídico laboral. *Actualidad laboral*, (6), pp. 710-717.

¹³⁶ Igartua Miró, M. T., 2014. Carga de la prueba en responsabilidad por accidente de trabajo y enfermedad profesional y tutela de la seguridad y salud en el trabajo en España. *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 2(2), pp. 45-74.

¹³⁷ Signes Todolí, A. and Tyc, A., 2016. La carga de la prueba en el proceso laboral español y comparado. *Revista de Trabajo y Seguridad Social*, (396), pp. 109-130.

¹³⁸ Tullini, P., 2014. La decisione del giudice tra allegazioni e onere della prova. Questioni aperte dopo la riforma dell'art. 18 dello statuto dei lavoratori. *Lavoro e Diritto*, (2-3), pp. 435-456.

¹³⁹ San Cristóbal Villanueva, J. M., 2004. La valoración judicial de la prueba: prueba válida y lícita en los despidos disciplinarios y económicos. *Justicia laboral*, (18), pp. 21-60.

See also a Latin American contribution in this field: Iglesias Merrone, L., 2015. Consideraciones acerca de la prueba ilícita en el proceso laboral. *La Justicia Uruguaya*, (151), pp. 75-80.

¹⁴⁰ Colàs-Neila, E. and Yélamos Bayarri, E., 2019. Prueba digital ilícita y calificación del despido: la constatación judicial de la vulneración de derechos fundamentales no puede suponer otra cosa sino la nulidad. In: De Quintana, M. Mirón y F. Pérez Durán, dir. 2019. *XXIX Jornades Catalanes de Dret Social. Noves tecnologies i relacions laborals*. (2nd ed.). Barcelona: Centre d'Estudis Jurídics i Formació Especialitzada. pp. 255-283

working tools and apps (computer, email, Internet), how social networks can be used as evidence, or which is the legal nature (and how should be used in trial) of WhatsApp messages.¹⁴¹ This issue is also treated in other legal systems, such as the Italian case, focusing on the admissibility of certain evidence obtained by the exercise of corporate control and the possible consideration of its unlawfulness.¹⁴²

► Final proceedings and judgement

There are several aspects of the labour judgment that have been dealt with in the doctrine. **Different questions** relating to final proceedings,¹⁴³ *res judicata*,¹⁴⁴ review of final judgements¹⁴⁵ or the inclusion of dissenting opinions¹⁴⁶ have been considered by Spanish literature. Of particular interest is the General Report of the XVIth Meeting of the European Labour Court Judges, on issues relating decision-making in Labour Courts such as when the case is decided (in the main hearing or in another separate session), the role that a presenting officer plays in the process, the contribution of lay members in the decision-making process, or the extent that the presiding judge takes part in writing the decision.¹⁴⁷

Among the minimum contents of the judgement, along with the facts proven as seen in the previous point, the judge's decision is argued in law. A set of contributions around questions relating to the **argumentation of the judicial decision**, particularly its motivation and congruence, can be mentioned,

¹⁴¹ García-Perrote Escartín, I. and Mercader Uguina, J. R., 2007. La prueba electrónica y el control de los medios informáticos de los trabajadores en la reciente doctrina de Tribunal Supremo. *Justicia laboral*, (32), pp. 5-12.

Muñiz Ferrer, R., 2017. Los nuevos medios de prueba en el procedimiento laboral: teléfonos móviles y "whatsapps". *Trabajo y Derecho*, (30), pp. 121-129.

Nores Torres, L. E., 2014. Algunas cuestiones sobre la utilización de las redes sociales como medio de prueba en el proceso laboral. *Actualidad Laboral*, (3).

Selma Penalva, A., 2014. La información reflejada en las redes sociales y su valor como prueba en el proceso laboral: análisis de los últimos criterios jurisprudenciales. *Revista General de Derecho del Trabajo y de la Seguridad Social*, (39).

¹⁴² Gamba, C., 2016. Remote control of workers' activities and the using of evidence in the trial. *Labour & Law Issues*, 2(1), pp. 120-157.

¹⁴³ Valle Muñoz, F. A., 2014. *Las diligencias finales en el proceso laboral*. Valencia: Tirant lo Blanch.

¹⁴⁴ De Castro Mejuto, L. F., 2009. La sentencia laboral constitutiva "pura": Previsiones, estructura y eficacia. *Actualidad laboral*, (14), p. 1.

Díaz de Rábago Villar, M., 2002. La ampliación del ámbito objetivo de la cosa juzgada en el proceso laboral a consecuencia de la nueva Ley de Enjuiciamiento Civil. *Actualidad laboral*, (2), pp. 479-489.

¹⁴⁵ Marín Correa, J. M., 2002. La revisión de sentencias firmes. *Actualidad laboral*, (3), pp. 3199-3201.

¹⁴⁶ Palomeque López, M. C., 2015. Los votos particulares de las sentencias judiciales. *Trabajo y Derecho*, (5), pp. 9-12.

¹⁴⁷ Saloheimo, J., (2008). General report: Decision-making in Labour Courts. XVIth Meeting of European Labour Court Judges. [pdf] Available at: <http://www.oit.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159882.pdf> [Accessed: 23/06/2020].

both in Latin America (related to specific matters such as irrevocability or dismissal cases)¹⁴⁸ and Europe. In this latter, singular reference must be done, on the one hand, to a specific analysis of the Spanish Constitutional Court's reasonability test, which is an argumentation technique used to control ordinary legality through the interpretation of Article 24.1 SC, comprising in the principle of congruence, among others, their application criteria.¹⁴⁹ And on the other hand, to an Italian contribution, which considers a particularly worrying phenomena in this regard: the attempts of the lawmaker to reduce justifications that judges must include in their decisions, despite constitutional provisions.¹⁵⁰

► Provisional and final enforcement of ruling

The contributions at this point come **exclusively from Spanish scholars** and belong to a **very varied set of questions**:

- **General questions** of enforcement¹⁵¹ and a **particular** related topic, such as reparation of damage.¹⁵²
- **Provisional execution** on a general basis¹⁵³ and in very specific cases.¹⁵⁴

¹⁴⁸ In Uruguay, see Rossi Albert, R., 2016. Hechos, Derecho y congruencia en situaciones de comunicación de la responsabilidad en el proceso laboral uruguayo. *Derecho Laboral: Revista de Doctrina, Jurisprudencia e Informaciones Sociales*, (263), pp. 493-512.

In the Argentinean case, see:

-Rodríguez Mancini, J., 2014. Congruencia e irrenunciabilidad. *Revista Derecho del Trabajo*, (8), pp. 2059-2066.

-Elmelaj, M. L., 2014. Congruencia inconstitucional de oficio e indemnización por despido. *Revista Derecho del Trabajo*, (8), pp. 2105-2114.

¹⁴⁹ Mercader Uguina, J. R., 2008. Tutela judicial efectiva, control de razonabilidad de las decisiones judiciales y "canon reforzado" de motivación en la doctrina del Tribunal Constitucional. *Revista del Ministerio de Trabajo e Inmigración*, (73), pp. 127-146.

¹⁵⁰ Taruffo, M., 2014. La motivazione della sentenza: riforme in peius. *Lavoro e Diritto*, (2-3), pp. 373-388.

¹⁵¹ Torró Enguix, J., 2013. Novedades relevantes en materia de ejecución introducidas por la Ley reguladora de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103), (Monográfico sobre la Ley de la Jurisdicción Social), pp. 397-421.

¹⁵² Sánchez Pérez, J., 2019. La reparación del daño en la jurisdicción social. *Nueva Revista Española de Derecho del Trabajo*, (216), pp. 181-210.

¹⁵³ González Calvet, J., and Salinas Molina, F., 2016. *Ejecución Provisional de las Sentencias en la Jurisdicción Social*. Valencia: Tirant lo Blanch.

¹⁵⁴ González Calvet, J., 2014. La ejecución provisional de sentencias frente a entes públicos en el proceso social. *Revista de Derecho Social*, (66), pp. 81-109.

Ruiz Salvador, J. A., 2000. Ejecución provisional de sentencias ex art. 50 del Estatuto de los Trabajadores: visión crítica del estado actual de la cuestión. *Revista de Derecho Social*, (12), pp. 71-92.

- Execution in cases of **dismissal**,¹⁵⁵ analysing several very specific issues, such as the cases of collective dismissals¹⁵⁶ or provisional enforcement.¹⁵⁷
- Monetary execution.¹⁵⁸
- Cases related to execution of sentences dictated abroad, or national judgements to be executed abroad.¹⁵⁹
- Or, finally, the particular case of the enforcement of judgments of a collective nature from an individual perspective.¹⁶⁰

► Procedural arrangements

Labour procedural rules recognise particularities, depending on the subject matter of the dispute, with respect to the ordinary procedure. Once again, there is a pre-eminence of Spanish literature in this

¹⁵⁵ García de Paredes, M. L., 2004. Proceso de despido: ejecución de sentencia. *Actualidad laboral*, (13-24), pp. 1609-1612.

¹⁵⁶ Fernández Docampo, B., 2017. La ejecución en los procesos de despidos colectivos: especial referencia a las sentencias de naturaleza colectiva. *Trabajo y Derecho*, (28), pp. 57-72.

¹⁵⁷ Casajuana Palet, M. N. P., 2001. Ejecución provisional y nulidad de actuaciones en proceso por despido. *Revista de Derecho Social*, (13), pp. 135-150.

Gorelli Hernández, J., 2001. En torno a la autonomía de la ejecución provisional del despido. *Actualidad Laboral*, (48), pp. 861-884.

¹⁵⁸ Martínez Girón, J., 2018. El apremio pecuniario en los procesos laborales. *Trabajo y Derecho*, (39), pp. 13-28.

Salinas Molina, F., 2001. Ejecución dineraria. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 113-142.

¹⁵⁹ Gámez Jiménez, J. M., 2015. El cumplimiento de la sentencia laboral en el estado de origen o en un estado extranjero. *Revista de Información Laboral*, (4), pp. 25-39.

Palao Moreno, G., 2017. Reconocimiento y ejecución de sentencias extranjeras en materia de contrato individual de trabajo en España. *Revista del Ministerio de Empleo y Seguridad Social*, (132), pp. 111-128.

Palao Moreno, G., 2018. Reconocimiento y ejecución de sentencias extranjeras en materia de contrato individual de trabajo en España. *Revista del Ministerio de Empleo y Seguridad Social*, (137) (Monográfico: La Carta Social Europea), pp. 413-436.

¹⁶⁰ Marín Correa, J. M., 2005. Conflicto colectivo y ejecución de sentencia: incidencia individual y colectiva. *Actualidad laboral*, (1), pp. 180-182.

case. The specialities recognised in the Social Jurisdiction Act that have been largely analysed can be grouped in the following lawsuits:

- On **fundamental rights**.¹⁶¹ However, there is a contribution related to **France** that must be cited, as it describes which courts have competences in this field depending on a subjective perspective of the dispute, namely the case of the *Conseil Constitutionnel* on constitutional control, the *Conseil d'Etat* on the objective review of legality and the *Cour de Cassation* on the subjective control of conformity.¹⁶²
- On collective actions.¹⁶³

¹⁶¹ See related issues, such as completion of the measures of inquiry in cases of discrimination and those in which fundamental rights are involved (supra Section 04.05); relations between labour ordinary courts and constitutional courts through the possibility of judicial review (infra Section 05), and the role of ordinary and constitutional courts recognising workers' fundamental rights (infra Section 06).

Among the huge literature analysing this procedural arrangement, see:

Blasco Jover, C., 2012. Las novedades introducidas en la modalidad procesal de tutela de derechos fundamentales tras la Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social. *Actualidad Laboral*, (15-16), p. 1.

Castro Argüelles, M. A., 2014. *Derechos Fundamentales en el Proceso Laboral*. Lecture presented in XXIV Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, Pamplona, 29-30 de mayo de 2014 (pp. 1-77). [pdf] Available at: <http://academica-e.unavarra.es/xmlui/bitstream/handle/2454/10906/Maria_Antonia_Castro.pdf?sequence=1&isAllowed=y> (Accessed: 06/09/2019).

Desdentado Bonete, A. and Menéndez Sebastián, P., 2008. El Ministerio Fiscal en el proceso social de tutela de los derechos fundamentales. *Justicia laboral*, (34), pp. 13-31.

Moya Amador, R., 2013. La tutela de los derechos fundamentales y libertades públicas en la Ley reguladora de la jurisdicción social. *Aranzadi Social*, 5(10), pp. 115-144.

Roldán Martínez, A., 2013. La tutela de los derechos fundamentales y libertades públicas a través de las modalidades procesales del artículo 184 de la Ley Reguladora de la Jurisdicción Social. *Revista de Trabajo y Seguridad Social*, (362), pp. 51-82.

San Cristóbal Villanueva, J. M., 2004. La tutela de los derechos fundamentales y el acoso (moral) a la luz de la actual normativa. *Justicia laboral*, (20), pp. 25-62.

Tolosa Tribiño, C., 2012. La nueva regulación del proceso de tutela en la jurisdicción laboral. *Justicia laboral*, (50), pp. 29-48.

¹⁶² Escande-Varniol, M. C., 2015. La protección jurisdiccional de los derechos fundamentales de los trabajadores en Francia. *Revista de Derecho Social*, (69), pp. 129-142.

In France as well, focused in discrimination cases, see Laulom, S., 2015. Les recours judiciaires et extra-judiciaires contre les discriminations. *Revue de Droit du Travail*, (2), pp. 91-99.

¹⁶³ Artacho Martín-Lagos, M., 2008. La tutela jurisdiccional de los intereses colectivos en el proceso de conflictos colectivos. *Revista General de Derecho Procesal*, (16).

Cano Galán, Y., 2013. La tramitación de los conflictos plurales por el proceso de conflicto colectivo en la Ley reguladora de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 257-286.

García Romero, B., 2013. Novedades en las modalidades procesales colectivas en la LJS. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 231-255.

Ron Latas, R. P., 2012. El proceso de conflictos colectivos en la nueva Ley reguladora de la Jurisdicción Social. *Actualidad laboral*, (12), p. 1

- On dismissal.¹⁶⁴
- On social security issues.¹⁶⁵
- On summary procedurals for payment,¹⁶⁶ where contributions on the **Italian**¹⁶⁷ and the **Uruguayan** cases¹⁶⁸ may also be noted.

¹⁶⁴ Asensio López, L. and Sánchez Álvarez, E., 2003. Sobre la nueva redacción del art. 56 del Estatuto de los Trabajadores y sus implicaciones procesales. *Revista de Derecho Social*, (22), pp. 91-116.

Cavas Martínez, F., 2013. Los procesos por despido y otras modalidades procesales individuales en la Ley reguladora de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 183-229.

Ron Latas, R. P., 2014. La modalidad procesal de despidos y sanciones en la Ley Reguladora de la Jurisdicción Social. *Actualidad Laboral*, (10), p. 3.

¹⁶⁵ Barrios Baudor, G. J., 2013. Impugnación de prestaciones de la Seguridad Social y de actos administrativos en materia laboral y de Seguridad Social no prestacionales en la Ley 36/2011, de 10 de octubre, reguladora de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 287-316.

Del Valle de Joz, J. I., 2017. *Seguridad social y proceso*. Pamplona: Aranzadi – Thomson Reuters.

Iglesias Osorio, B. C., 2016. *Jurisdicción y procesos de Seguridad Social*. Pamplona: Lex Nova Thomson Reuters.

Lasaoa Irigoyen, E., 2013. La extensión de la jurisdicción social en materia de seguridad social en el presente. *Revista Española de Derecho del Trabajo*, (159), pp. 151-182.

Rabanal Carbajo, P. F., 2014. La nueva modalidad procesal de impugnación del alta médica (art. 140.3 LJS). *Revista del Ministerio de Empleo y Seguridad Social*, (109), pp. 15-32.

¹⁶⁶ Bonachera Villegas, R., 2013. Un nuevo instrumento procesal para la tutela del crédito del trabajador el proceso monitorio laboral. *Revista General de Derecho Procesal*, (29).

Cámara Botía, A., 2013. El proceso monitorio en la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 157-181.

Roca Martínez, J. M^a, 2016. *El proceso monitorio laboral*. Pamplona: Lex Nova – Thomson Reuters.

¹⁶⁷ Carratta, A., 2017. I provvedimenti d'urgenza nel prisma dei rimedi giurisdizionali in materia di lavoro. *Lavoro e Diritto*, (3-4), pp. 537-564.

¹⁶⁸ Goldstein, E., 2015. Actualización de los créditos laborales en el proceso laboral. *La Justicia Uruguaya*, (152).

Goldstein, E., 2015. Ajuste de los créditos laborales deducidos en el proceso laboral. *Revista CADE: Profesionales y Empresas*, 31.

- Other particular cases are job classification,¹⁶⁹ family-related leaves,¹⁷⁰ penalties in the social order,¹⁷¹ electoral procedures for workers' representatives¹⁷² and proceedings started by the Labour Inspection.¹⁷³

► Some empirical data to consider

Some public institutions in the field of justice conduct empirical studies on specific issues that must be taken into account in order to assess the effectiveness of procedural regulations. In general, issues such as the number of cases filed and resolved annually, sometimes with monthly follow-ups, and the length of proceedings are taken into account. Please note the following organisations for the purpose of obtaining some of the above data:

- Judicial Career Council of Guatemala (*Consejo de la Carrera Judicial de Guatemala*), on aspects such as cases filed, hearings held, appeals to superior courts or judgments issued.¹⁷⁴

¹⁶⁹ Gil Plana, J., 2004. Modalidad procedimental: clasificación profesional. *Actualidad laboral*, (13-22), pp. 2093-2103.

Valle Muñoz, F. A., 2012. La reforma del proceso judicial de clasificación profesional. *Actualidad laboral*, (13-14), p. 3.

¹⁷⁰ Lousada Arochena, J. F., 2003. La modalidad procesal especial en materia de permiso de lactancia y de reducción de jornada por motivos familiares. *Actualidad laboral*, (2), pp. 473-490.

¹⁷¹ Orcaray Reviriego, J. J., 2007. El principio de "non bis in idem" y su reflejo en el procedimiento sancionador por infracciones del orden social. *Justicia laboral*, (29), pp. 11-60.

¹⁷² Romero Ródenas, J., 2013. El nuevo régimen jurídico de impugnación de preavisos electorales tras la entrada en vigor de la Ley de la Jurisdicción Social. *Aranzadi Social*, 6(1), pp. 2003-2011.

Romero Ródenas, M. J., 2002. De nuevo sobre el procedimiento adecuado para la impugnación del preaviso de elecciones sindicales. *Revista de Derecho Social*, (20), pp. 199-204.

¹⁷³ López Parada, R. A., 2019. La Inspección de Trabajo y Seguridad Social en la Jurisdicción Social. *Trabajo y Derecho*, (3 Extra).

Sempere Navarro A. V., 2017. El procedimiento de oficio y la Inspección de Trabajo. *Revista del Ministerio de Empleo y Seguridad Social*, (128) (Monográfico: La Inspección de Trabajo y Seguridad Social), pp. 37-60.

¹⁷⁴ Consejo de la Carrera Judicial de Guatemala, Centro de Información, desarrollo y estadísticas, 2019. Estadísticas e indicadores judiciales, Casos ingresados período 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/casos%20ingresados%202017-2018.pdf>> (Accessed: 06/09/2019).

-2019. Estadísticas e indicadores judiciales, Sentencias tipo fallo período 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/sentencia%20tipo%20fallo.pdf>> (Accessed: 06/09/2019).

-2019. Estadísticas e indicadores judiciales, Recursos en salas de apelaciones 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/recursos%20en%20salas.pdf>> (Accessed: 06/09/2019).

-2019. Estadísticas e indicadores judiciales, Audiencias celebradas 2017-2018, 2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/audiencias%20celebradas.pdf>> (Accessed: 06/09/2019).

-2019. Estadísticas e indicadores judiciales, Resoluciones judiciales 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/resoluciones%20judiciales.pdf>> (Accessed: 06/09/2019).

- Federal Judiciary Council of Mexico (*Consejo de la Judicatura Federal de México*), on total labour cases analysed, as well as disaggregated data by type of court.¹⁷⁵
- General Council of the Judiciary (*Consejo General del Poder Judicial Español*), including detailed information disaggregated by various factors available in a variety of aspects.¹⁷⁶
- Council of the Judiciary of the Dominican Republic (*Consejo del Poder Judicial de la República Dominicana*), although in this case the information is related general information provided by judicial bodies to consultations organised by category of information (request for file data, clarification of documents...),¹⁷⁷

Highly diverse quantitative and qualitative data of member states of the Council of Europe are offered by the European Commission for the Efficiency of Justice (CEPEJ) in the **Dynamic database of European Judicial systems**, some of which have been mentioned above at various points.¹⁷⁸

¹⁷⁵ Consejo de la Judicatura Federal de México, Dirección General de Estadística y Planeación Judicial, 2019. Estadística mensual 2019, Movimiento estadístico total de asuntos en materia de trabajo. [pdf] Available at: <https://www.dgepj.cjf.gob.mx/resources/estadisticas/2019/19_MES_GRAF_INST_T.pdf> (Accessed: 06/09/2019).

-2019. Estadística mensual 2019, Movimiento estadístico total de asuntos en materia de trabajo en los tribunales colegiados de distrito. [pdf] Available at: <https://www.dgepj.cjf.gob.mx/resources/estadisticas/2019/19_MES_GRAF_COL_MAT_T.pdf> (Accessed: 06/09/2019).

-2019. Estadística mensual 2019, Movimiento estadístico total de asuntos en materia de trabajo en los juzgados de distrito. [pdf] Available at: <https://www.dgepj.cjf.gob.mx/resources/estadisticas/2019/19_MES_GRAF_JUZ_MAT_T.pdf> (Accessed: 06/09/2019).

¹⁷⁶ Consejo General del Poder Judicial Español, Sección de estadística judicial, 2007. Boletín 6. Evolución de la jurisdicción social a la vista de la estadística judicial. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA%20JUDICIAL%20NUEVO/FICHEROS/Datos%20de%20Justicia/Boletines%20Anteriores/Boletin%20nº%2006%20%20Evolución%20de%20la%20Jurisdicción%20Social%20a%20la%20vista%20de%20la%20Es.pdf>> (Accessed: 06/09/2019).

-2018. Panorámica de la justicia 2017. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/Panoramicajusticia/Años%20antriores/Panorámica%20de%20la%20Justicia%202017.docx>> (Accessed: 06/09/2019).

-2019. Justicia Dato a dato 2018. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/JusticiaDatoaDato/Datos%20Anteriores/Justicia%20Dato%20a%20Dato%202018.pdf>> (Accessed: 06/09/2019).

-2019. Asuntos judiciales sociales 2018. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/3004%20Asuntos%20Judiciales%20sociales/Datos%20anteriores/Asuntos%20judiciales%20sociales%202018.xls>> (Accessed: 06/09/2019)

¹⁷⁷ Consejo del Poder Judicial de la República Dominicana, Centro de información y orientación ciudadana, 2019. Estadísticas 2019. [pdf] Available at: <https://poderjudicial.gob.do/documentos/PDF/Estadisticas/estadisticas_ciocs_2019.pdf> (Accessed: 06/09/2019).

¹⁷⁸ European Commission for the efficiency of Justice (CEPEJ). Council of Europe, 2019. Dynamic database of European judicial systems. [Online] Available at: <<https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems>> (Accessed: 06/09/2019).

► 5 Judicial review

This section analyses the doctrine on appeals of labour judgments. Many legal systems also consider claims against administrative bodies under the appeal institution, such as the social security administration or labour inspection resolutions. It is even often considered a requirement to bring an action in courts against the public administration.¹⁷⁹ Despite this, literature analyses not only national but also supranational second instances and extraordinary appeals regarding judicial decisions.

In line with what has been seen regarding several points in the previous section, the vast majority of literature on **appeals within the scope of social jurisdiction** refers to the Spanish case,¹⁸⁰ except for a modest contribution in the German case.¹⁸¹ Special mention should be made to an interesting comparative analysis between France and Italy on the possibility to request an opinion from the court of last instance in order to reduce disputes by increasing their interpretative function, despite it being used very rarely in both cases.¹⁸²

Similarly at a **national level**, the **relationship between ordinary (social) jurisdiction and constitutional jurisdiction** has also been analysed, but mainly from the point of view of the role that the latter

¹⁷⁹ See supra Section 02.04.

¹⁸⁰ Desdentado Bonete, A., 2001. De nuevo sobre la contradicción de sentencias en el recurso de casación para la unificación de doctrina. *Revista de Derecho Social*, (13), pp. 41-70.

Desdentado Bonete, A., 2001. Los recursos en el proceso social y la nueva Ley de Enjuiciamiento Civil. *Revista del Ministerio de Trabajo e Inmigración*, (28), pp. 155-168.

Desdentado Bonete, A., 2013. La nueva casación para la unificación de doctrina en la Ley reguladora de la Jurisdicción Social. *Revista del Ministerio de Empleo y Seguridad Social*, (103), (Monográfico sobre la Ley de la Jurisdicción Social), pp. 373-395.

Ferrando García, F. M., 2013. El recurso de casación ordinaria y otros medios de impugnación en el orden social. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 351-372.

Lorenzo de Membiola, J. B., 2000. La regulación del recurso de reposición en la Ley de Procedimiento Laboral tras la publicación de la Ley de Enjuiciamiento Civil de 7 de enero de 2000, núm. 1. *Actualidad laboral*, (2), pp. 301-317.

Martínez Cebrián, C., 2016. La interpretación pro-recurso del artículo 191.2 e) de la Ley reguladora de la Jurisdicción Social. *Trabajo y Derecho*, (18), pp. 127-130.

Molins García-Atance, J., 2018. El recurso de suplicación contra las sentencias dictadas en materia de seguridad social. *Trabajo y Derecho*, (41), pp. 77-86.

Morales Váñez, C. E., 2012. *Los recursos en la nueva Ley reguladora de la jurisdicción social*. Madrid: Civitas

Orellana Cano, A. M., 2009. El recurso de suplicación en materia de Seguridad Social. *Revista del Ministerio de Trabajo e Inmigración*, (84).

Sempere Navarro, A. V., 2013. El recurso de suplicación: objeto y ámbito. *Revista del Ministerio de Empleo y Seguridad Social*, (103) (Monográfico sobre la Ley de la Jurisdicción Social), pp. 317-349.

Valle Muñoz, F. A., 2014. La admisión de recursos con defectos formales en el proceso laboral. *Iuslabor*, (1).

¹⁸¹ Lipke, G.-A., 2007. Prozesspraxis: Die Berufung im arbeitsgerichtlichen Verfahren Insbesondere: Beschränkung und Zurückweisung von Tatsachenvortrag. *Arbeit Und Recht*, 55 (1/2), pp. 1-6.

¹⁸² Brun, S. and Dalla Bontà, S., 2019. L'“accertamento pregiudiziale” sull'interpretazione degli accordi collettivi in Francia. *Giornale di diritto del lavoro e di relazioni industriali*, 41(2), pp. 285-320

has played in recognising workers' fundamental rights.¹⁸³ In this field, two very specific and interesting subjects have been studied in Spain: the options before the non-compliance of constitutional rulings by ordinary jurisdiction,¹⁸⁴ and the approximation to constitutional jurisprudence on international law applicable to the labour process.¹⁸⁵

In relation to **appeals before international judicial bodies**, there are contributions in **Latin America** that analyse all human rights instruments recognising labour rights, their control procedures and the role of the Inter-American Commission and Court regarding labour human rights, with a special focus on how it impacts domestic legal systems.¹⁸⁶ There are contributions in **Europe** that focus on the two main supranational judicial instruments. On the one hand, the context of the Council of Europe with respect to the European Court of Human Rights, an approach to its role in the socio-occupational field across the study of its case-law on freedom of association, right to privacy and forced labour, or freedom of expression,¹⁸⁷ as well as its influence on domestic legal systems concerning the right to a fair trial.¹⁸⁸ On the other hand, in relation to the Court of Justice of the European Union, its impact on dealing with labour law cases has been also studied from different national perspectives (Italy, Spain and the UK) and in specific cases (interim measures, temporary employment).¹⁸⁹ One last field is related to supranational non-judicial or quasi-judicial bodies. The interest shown in the reception by national supreme courts of their decisions should also be cited. A good example is related to the French *Cour de cassation*, where a non-explicit influence can be perceived from the decisions by the European Court of Social Rights or the ILO's Committee of Experts, within a context of the high deregulation of national labour laws.¹⁹⁰

From the perspective of **practically applying** the regulations in this field, it should be pointed out that the aforementioned Dynamic database of the European Commission for the Efficiency of Justice offers relevant **quantitative and qualitative** data on this point; in particular on the existence of a second instance for labour matters, or a Constitutional Court in European states.¹⁹¹

An important aspect in relation to the review of decisions by higher courts is the rate of reversals of first instance judgments. Institutions such as the Judicial Career Council of Guatemala (*Consejo de la Carrera Judicial de Guatemala*) provides data on the appeals cancelled, confirmed, denied, modified and

¹⁸³ On this role of constitutional courts recognizing workers' fundamental rights, as well as in some cases ordinary courts, see *infra* Section 06). There are other related issues in this report, such as completion of the measures of inquiry in cases of discrimination, and those in which fundamental rights are involved (*supra* Section 04.05); or procedural arrangements (*supra* Section 04.08).

¹⁸⁴ Baylos Grau, A., 2001. ¿Qué se puede hacer ante el incumplimiento de una sentencia del TC por un órgano jurisdiccional renuente? *Revista de Derecho Social*, (16), pp. 133-140.

¹⁸⁵ Fernández-Lomana García, M., 2008. La doctrina del Tribunal Constitucional sobre cuestiones de Derecho Internacional en el proceso laboral. *Revista del Ministerio de Trabajo e Inmigración*, (73), pp. 99-126.

¹⁸⁶ Canessa Montejo, M. F., 2014. *El sistema interamericano de derechos humanos y la protección de los derechos humanos laborales*. Lima: Palestra.

¹⁸⁷ Cabeza Pereiro, J., 2015. La protección jurisdiccional de los derechos humanos y libertades fundamentales de los trabajadores ante el Tribunal Europeo de Derechos Humanos. *Revista de Derecho Social*, (69), pp. 79-102.

¹⁸⁸ Monereo Pérez, J. L. and Ortega Lozano, P. G., 2017. Derecho a un proceso justo o equitativo a la luz de la jurisprudencia del Tribunal Europeo de Derechos Humanos: especial incidencia en las condenas a España. *Trabajo y Derecho*, (34), pp. 13-32.

¹⁸⁹ Chocrón Giráldez, A. M., 2015. La demanda de medidas provisionales ante el Tribunal de Justicia de la Unión Europea. In: M. D. Ramírez Bendala, ed. 2015. *Buenas prácticas jurídico procesales para reducir el gasto social (III)*. Murcia: Laborum. pp. 181-200

Davies, A. C. L., 2012. The Court of Justice as a Labour Court. *Cambridge Yearbook of European Legal Studies*, 14, pp. 145-176.

Guastaferrero, B., 2017. The unexpectedly talkative 'dumb son': the Italian Constitutional Court's dialogue with the European Court of Justice in protecting temporary workers' rights in the public education. *European Constitutional Law Review*, 13(3), pp. 493-524.

¹⁹⁰ Laulom, S., 2014. Reception by the French Court of Cassation of the Decisions of the Non-Judicial Bodies of the International Organisation. *Revue de Droit Comparé du Travail et de la Sécurité Sociale*. (3), pp. 16-25.

¹⁹¹ European Commission for the efficiency of Justice (CEPEJ). Council of Europe, 2019. Op. cit.

granted by the Labour Appeal Court (*Sala de Corte de Apelaciones de Trabajo*).¹⁹² The Spanish General Council of the Judiciary (*Consejo General del Poder Judicial Español*) similarly analyses this data in their reports and publications, related to the quality of the sentences handed down (ratio of appeals and judgments, rate of confirmed appeals and percentage of annulled judgments).¹⁹³

¹⁹² Consejo de la Carrera Judicial de Guatemala, Centro de Información, desarrollo y estadísticas, 2019. Estadísticas e indicadores judiciales, Sentencias tipo fallo período 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/sentencia%20tipo%20fallo.pdf>> (Accessed: 06/09/2019).

-2019. Estadísticas e indicadores judiciales, Recursos en salas de apelaciones 2017-2018. [pdf] Available at: <<http://www.oj.gob.gt/estadisticas/recursos%20en%20salas.pdf>> (Accessed: 06/09/2019).

¹⁹³ Consejo General del Poder Judicial Español, Sección de estadística judicial, 2018. Panorámica de la justicia 2017. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/Panoramicajusticia/Años%20anteriores/Panorámica%20de%20la%20Justicia%202017.docx>> (Accessed: 06/09/2019).

-2019. Boletín 62. Calidad de las sentencias 2018. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/Datos%20de%20Justicia/Boletines%20Anteriores/Boletín%20nº%2062%20-%20Calidad%20de%20las%20sentencias%202018.pdf>> (Accessed: 06/09/2019).

-2019. Justicia Dato a dato 2018. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/JusticiaDatoaDato/Datos%20Anteriores/Justicia%20Dato%20a%20Dato%202018.pdf>> (Accessed: 06/09/2019).

► 6 Role of judges and labour courts implementing their judicial function

This section includes research on the role of judges and labour courts when implementing their judicial function that goes beyond a descriptive analysis of the outcome of the labour proceeding that is the ruling or the possibility of appeal. Issues such as the interpretation of rules, their capacity to innovate in their decision-making process or the ideological and political incidence in their judgements are addressed.

A first body of literature is related to the **interpretation and application of legal norms** in general, both **procedural** and substantive. In the former, for instance, on the formulation and application of reasonableness and proportionality tests in labour law cases in the UK, from the perspective of judicial self-restraint or “defence”.¹⁹⁴ Or in the Spanish case, on a specific appeal for unification of doctrine to the Supreme Court (*Tribunal Supremo*), directly linked to create, maintain or change case law,¹⁹⁵ and general approaches to the interpretation of procedural rules by constitutional and ordinary jurisprudence.¹⁹⁶

Regarding the impact of judges when applying substantive regulation, a mention should be made to the Italian case, where the specific case of dismissal after the 2012 reform is studied, leading to doubts in the procedural field about the restriction of judicial prerogatives.¹⁹⁷ But other more classic topics as also treated, such as **judicial control and review of business decisions**, mainly produced in the European context on issues such as the prohibition of or limitation to judicial review to control employers’ organisational and economic decisions in France;¹⁹⁸ substantial changes of working conditions and collective dismissals in Spain;¹⁹⁹ there is also a comparative analysis on collective dismissals that includes some European countries, on substantive and procedural aspects, evaluating the possibility

¹⁹⁴ Davies, A. C. L., 2009. Judicial Self-Restraint in Labour Law. *Industrial Law Journal*, 38(3), pp. 278–305.

¹⁹⁵ Gámez Jiménez, J. M., 2016. Lógica y jurisprudencia en el proceso laboral. *Revista de Información Laboral*, (4), pp. 21-35.

¹⁹⁶ Desdentado Bonete, A., 2008. El proceso social en la doctrina constitucional reciente (2003-2007). Una reseña crítica. *Revista del Ministerio de Trabajo e Inmigración*, (73), pp. 51-98.

Salinas Molina, F., 2015. La ley reguladora de la jurisdicción social y su interpretación por la jurisprudencia social. In E. Rojo Torrecilla and M. I. Ramos Quintana, ed. 2015. *Vulnerabilidad de los derechos laborales y de protección social de los trabajadores*. Barcelona: Huygens. pp. 217-262

¹⁹⁷ Tullini, P., 2014. Op. Cit.

¹⁹⁸ Perrone, F., 2016. L’interdiction du contrôle judiciaire du contenu des choix organisationnels et économiques de l’entrepreneur. *Revue de Droit du Travail*, (9), pp. 542-550.

Other essays related to the possibilities of judicial review of employers’ decisions:

-Adam, P., 2011. Le juge (civil) et la lune (managériale): sur le contrôle judiciaire de l’évaluation individualisée des performances. *Revue de Droit du Travail*, (12), pp. 705-707.

-Florès, P., 2014. Prise d’acte de la rupture et résiliation judiciaire du contrat de travail: les nouveaux atours de la jurisprudence. *Revue de Droit du Travail*, (7-8), pp. 447-453.

-Grévy, M. and Henriot, P., 2013. Le juge, ce gêneur. *Revue de Droit du Travail*, (3), pp. 173-178

¹⁹⁹ Alfonso Mellado, C. L., 2013. El control judicial de la modificación sustancial de condiciones, la movilidad funcional y la movilidad geográfica. *Revista de Derecho Social*, (62), pp. 17-52.

Martín Valverde, A., 2013. El control judicial de los despidos colectivos: puntos críticos (1). *Actualidad laboral*, (9), p. 1.

of action by the labour courts;²⁰⁰ or on unfair terms in the employment contract, in a comparative analysis of the Scottish and German cases.²⁰¹

The General Report of the XXth Meeting of European Labour Courts Judges, on **the role of the court in a labour dispute**, should also be underlined,²⁰² which addresses a number of key issues such as the differences in procedural rules between civil and labour disputes, focusing on the possibilities that judges have for a more active role in procedure; the preparation of the procedure and the development of the main hearing; and the role that the Court may play after the conclusion of the procedure, regarding the effect of judicial decisions.

In this context, the role of ordinary and/or constitutional courts **protecting workers' fundamental rights** deserves special attention, both in Latin America and Europe.²⁰³ In the former, there is a contribution discussing the Peruvian case, emphasising the role of the Constitutional Court in recognising workers' fundamental rights in contrast to the lack of adequate mechanisms in procedural rules, such as those provided for in countries like Chile or Spain.²⁰⁴ The majority of contributions refer to **European countries**, contained in a special issue journal where the protection of workers' fundamental rights by national (ordinary and/or constitutional courts) are analysed in different countries, such as Germany (basically focused on the interpretation of the constitutional court),²⁰⁵ Italy (using a multilevel methodology that combines domestic courts and the CJEU)²⁰⁶ and Portugal (whose departure point is a case study of wage reductions).²⁰⁷

A special mention must be made to **Colombia** with respect to the single instance labour process, insofar as the role of the **constitutional court** is vital for the recognition of fundamental rights in the procedural field.²⁰⁸ This procedural mechanism is used for minor labour lawsuits, completed in only one hearing and taking much less time than the first instance process, with no possibilities for any appeals. In order to avoid the breach of law and fundamental rights that it might cause, the Constitutional Court (*Corte Constitucional*) ruled the possibility of appeal (*consulta*) when the single instance judgement was totally contrary to the workers claims in 2015. Constitutional case law is analysed since 1993, indicating that no further analysis of the facts and claims of the single instance process was possible until the possibility of an integral review allowed after the sentence.

There is also a particular interest in this field regarding **international norms**. The approach to this issue has been made from the Mexican case, insisting that it is necessary to know how to apply them correctly beyond the awareness of international norms, especially in those cases in which there are

²⁰⁰ Le Roux, R. and Fiorentino, A., 2017. Redundancy and Judicial Power: Between Inaction and Creative Boldness. *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, (4), pp. 126-137.

²⁰¹ Silke Seeger, S., 2010. Judicial Control of Unfair Terms in Employment Contracts in Scotland and Germany: A Comparative Analysis. *International Journal of Comparative Labour Law and Industrial Relations*, 26(2), pp. 141-165.

²⁰² Blaha, M. et al., (2012). *General and National Reports. Topic 2 - The role of the Court in a labour dispute*. XXth Meeting of European Labour Court Judges. [pdf] Available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_194726.pdf> [Accessed: 23/06/2020].

²⁰³ See related issues, such as completion of the measures of inquiry in cases of discrimination and those in which fundamental rights are involved (supra Section 04.05); procedural arrangements (supra Section 04.08), and relations between labour ordinary courts and constitutional courts through the possibility of judicial review (infra Section 05).

²⁰⁴ Arce Ortiz, G. E., 2012. La tutela laboral de los derechos fundamentales del trabajador. Una asignatura pendiente en tiempos de reforma. *Derecho PUCP*, (68).

²⁰⁵ Seifert, A., 2015. La protección jurisdiccional de los derechos fundamentales de los trabajadores en Alemania. *Revista de Derecho Social*, (69), pp. 143-158.

²⁰⁶ Calafà, L., 2015. La protección de los derechos fundamentales de los trabajadores en algunos Estados Miembros de la Unión Europea. El caso italiano. *Revista de Derecho Social*, (69), pp. 159-170.

Tullini, P., 2016. Effettività dei diritti fondamentali del lavoratore: attuazione, applicazione, tutela. *Giornale di diritto del lavoro e di relazioni industriali*, 38(2), pp. 291-316.

²⁰⁷ Leal Amado, J., 2015. La protección jurisdiccional de los derechos fundamentales de los trabajadores en Portugal: tópicos sobre el caso de las reducciones salariales en el Sector Público. *Revista de Derecho Social*, (69), pp. 171-180.

²⁰⁸ Berrocal Durán, J. C. and Reales Vega, R. J., 2018. La Corte Constitucional colombiana y el proceso laboral de única instancia. *Justicia Juris*, 14 (1), pp. 9-15.

provisions inconsistent with domestic regulations.²⁰⁹ Along these lines, the analysis of the “dialogue” among national judges and the CJEU applying labour regulation should also be noted.²¹⁰

A relatively new area of interest is related to **gender issues**. An interesting essay focused on gender mainstreaming is aimed at describing how labour judges are bound by that principle, suggesting a method to integrate the gender dimension in the application of regulations and how a gendered approach should be made in labour courts.²¹¹

The capacity of labour judges to create law is mainly located in the European context, in those common law countries where the precedent is stronger than in continental legal systems, where this ability of the judge is much more contested. However, some essays have approached the “**judicial activism**” in **Latin America**, placing it normatively in the Mexican Constitution and jointly analysing with the “dynamic burden of the proof” and capacity of the judges implementing their activity within the context of due process and the right to a fair trial.²¹² On this topic as well, contributions from a philosophical perspective have been developed in Uruguay, and Colombia.²¹³ Special attention should be paid to an empirical analysis from the field of applied economy about the consequences of active labour courts on informality in Brazil, which are reduced in the case of unskilled workers and despite having no effects on skilled workers.²¹⁴

The **active and creative role of labour judges** has been treated in some **European literature**. For instance, in Spain, where some reflections on this issue have been made concerning the legal reform of collective dismissal, which removed the possibility that judges had to examine the opportunity to perform the measures decided by the employer.²¹⁵ Or in Italy, analysing the main case law in labour law issues for thirty years and linking these jurisprudential trends to the economic and political context, on the one hand, and the ideas of scholars, on the other hand. The last section in particular is especially interesting, dedicated to the attitudes of judges when faced with the reduction of both workers’ rights and their role in safeguarding them.²¹⁶ The **discretion of the judge** in the decision-making process has been a particular concern also in Italy, for example regarding its growth in the field of fixed term contracts, which has been argued is due to the reduction of systematicity of the legal order derived

²⁰⁹ Nazar Sevilla, N., 2010. Cómo deben aplicar los tribunales laborales las normas contenidas en los tratados internacionales. *Revista Latinoamericana de Derecho Social*, (11), pp. 111-125.

²¹⁰ Sciarra, S., ed. 2001. *Labour law in the courts. National judges and the European Court of Justice*. Oxford: Hart.

²¹¹ Lousada Arochena, J. F., 2016. La integración de la perspectiva de género en la aplicación e interpretación de las normas por la jurisdicción social. *Revista de Derecho Social*, (76), pp. 39-58.

²¹² López Soto, D. S., 2010. Activismo judicial en el derecho procesal del trabajo. *Revista Latinoamericana de Derecho Social*, (11), pp. 33-55.

²¹³ Meliante Garcè, L., 2004. La decisión judicial en el proceso laboral: Génesis, particularidades y mitos. *Revista de la Facultad de Derecho*, (23), pp. 65-78.

Nieves López, J. G., 2013. El papel creador del juez en el Estado Social de Derecho. *Justicia Juris*, 9(2), pp. 13-19.

²¹⁴ Araujo, L., Ponczek, V., and Portela Souza, A., 2016. Informality in an economy with active labour courts. *Applied Economics*, 48(30), pp. 2868-2882.

²¹⁵ Molina Navarrete, C., 2015. Independencia del juez social y seguridad jurídica: la tensión entre la ley y los “usos opcionales del derecho” en la experiencia laboral reciente, *Trabajo y Derecho*, (4), pp. 15-33.

See supra in this Section footnote 11.

²¹⁶ De Luca Tamajo, R., 2016. Il ruolo della giurisprudenza nel diritto del lavoro: luci e ombre di una attitudine creativa. *Lavoro e Diritto*, (4), pp. 813-822.

from the ambiguity and uncertainty of regulations, on the one hand, and the conflict of principles in the multi-level protection EU-national legal orders, on the other hand.²¹⁷

At this point, we could also include a recommended comparative contribution on the **role of judges implementing social policies**, derived from a survey in which different Labour Court models were included.²¹⁸ It is argued that their contribution to develop social policies is directly linked to the possibilities to access these courts, which represent the main way that workers have to enforce their rights in a context of decreasing union density.

Another point of interest reviewed refers to the impact that different actors have on the sentences handed down by the labour courts. On the one hand, the **ideological and political effects on some judicial bodies** have been analysed by comparing the German and US cases.²¹⁹ Based on an analysis of the likelihood of winning for employers and employees, it concludes that political leanings of those who nominated members of the NLRB and the BAG have a direct influence in the contents of their decisions. On the other hand, the idea that judicial decisions are affected by sentences handed down by their colleagues in neighbouring courts, at a provincial or regional level, is explored in **Spain**. Despite a lack of a global spatial correlation at a geographical level, it is identified at an administrative level, proving that **peer effects in court decisions are strongly evident**.²²⁰

It is also interesting to note a French contribution from the point of view of a **transparent judiciary and the educational capacity of citizens** in pursuit of its dispute resolution function.²²¹

²¹⁷ Ferrante; V., 2014. Tutela multilivello, norme ambigue, definizione dei ruoli del legislatore e del giudice. Il caso del contratto a termine, *Lavoro e Diritto*, (2-3), pp. 413-434.

Other essays on directionality in Italy:

-Ballestrero, M. V., 2014. Tra confusione e sospetti. Clausole generali e discrezionalità del giudice del lavoro. *Lavoro e Diritto*, (2-3), pp. 389-412.

-Novella M., 2019. Il ritorno della discrezionalità giudiziale dopo la sentenza n. 194/2018 della Corte costituzionale. *Lavoro e Diritto*, (2), pp. 285-304.

-Razzolini, O., 2016. I nuovi confini della discrezionalità del giudice in materia di lavoro a termine e licenziamento. *Lavoro e Diritto*, (3), pp. 417-438

²¹⁸ Adler, S., 2002. The Role of Judges in the Implementation of Social Policies. *International Journal of Comparative Labour Law and Industrial Relations*, 18(4), pp. 341–376. See also the interesting report that the same author carried out for IXth Meeting of the European Labour Judges: Adler, S., (2001). *General report. Theme 1 – The Role of Judges in the Implementation of Social Policies*. IXth Meeting of European Labour Court Judges. [pdf] Available at: < http://www.oit.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_160123.pdf> [Accessed: 23/06/2020].

²¹⁹ Bodah, M. M. and Schneider, M. R., 2014. Politics, Ideology and Adjudication: The German Federal Labor Court and the U.S. National Labor Relations Board. *Comparative Labor Law & Policy Journal*, 36(1), pp. 1-22.

²²⁰ Martín-Román, Á., Moral, A., and Martínez-Matute, M., 2015. Peer effects in judicial decisions: Evidence from Spanish labour courts. *International Review of Law and Economics*, 42, pp. 20–37.

²²¹ Guiomard, F., 2006. Sur les communiqués de presse de la Chambre sociale de la Cour de cassation. *Revue de Droit du Travail*, (4), pp. 222-229.

Considering the different rationale of substantive and procedural labour law from the civil regulations, a number of contributions analysing the role of labour courts from what we have called a **philosophical perspective** should be cited.²²²

Finally, some academic essays have focused on the **impact of economic crises** on social jurisdiction,²²³ something that has also been dealt with by public bodies related to justice. The interaction between unemployment rates and judicial activity in Mexico was mentioned earlier.²²⁴ But there are also interesting considerations on the impact of economic crises on social jurisdiction in Spain based on data-intensive analyses. Some of their main conclusions are remarkable: the number of cases filed was between a 50% and 25% higher in relation to 2007, pendency more than doubled, the length of some claims doubled (social security and payment claims) while others tripled (collective disputes).²²⁵

²²² Bellosó Martín, N., 2013. Una perspectiva iusfilosófica de la ley 36/2011 reguladora de la jurisdicción social. In: N. Martínez Morán, A. M. Marcos del Cano and R. Junquera de Estéfani, ed. 2013. *Derechos humanos: problemas actuales. Estudios en homenaje al profesor Benito de Castro Cid* (Vol. 2). Madrid: Universitas. pp. 1069-1095.

Molina Hermosilla, O., 2016. Los retos de la Jurisdicción Social ante el fenómeno de la economía submergida. In: J. L. Monereo Pérez and S. Perán Quesada, dir. 2016. *Derecho social y trabajo informal. Implicaciones laborales, económicas y de seguridad social del fenómeno del trabajo informal y de la economía sumergida*. Granada: Comares. pp. 571-592.

Ostau de Lafont de León, F., and Niño Chavarro, L., 2015. La justicia laboral como elemento esencial del trabajo decente en Colombia. *Verba Luris*, (33), pp. 165-182.

²²³ De Oliveira Pinto Hespanhol, M. J., 2013. Crisis económica y tiempo de la justicia: los recursos y el proceso laboral. *Anuario Coruñés de Derecho Comparado del Trabajo*, 5, pp. 153-164.

²²⁴ Consejo de la Judicatura Federal de México, Dirección General de Estadística y Planeación Judicial, 2010. Justicia Federal y desempleo 2003-2010. Op. Cit.

²²⁵ Consejo General del Poder Judicial Español, Sección de estadística judicial, 2016. Boletín 47. Evolución de la jurisdicción social en los años de crisis. [pdf] Available at: <<http://www.poderjudicial.es/stfls/ESTADISTICA%20JUDICIAL%20NUEVO/FICHEROS/Datos%20de%20Justicia/Boletines%20Anteriores/Boletin%20Nº%2047%20-evolucion%20jurisdiccion%20social%20en%20los%20años%20de%20la%20crisis.pdf>> (Accessed: 06/09/2019).

► 7 Evidence-based approach to the operation of judges and labour courts

The last chapter comprises a series of empirical studies that may allow an assessment of the effectiveness of procedural rules in achieving the objectives proposed by the lawmaker. A number of **official surveys of different national public bodies** related to justice, which provide data on the activity carried out by labour courts,²²⁶ have been mentioned throughout the report. The importance of **statistics** is such for a proper assessment of the functioning of the labour courts that some prestigious scientific journals, such as *Arbeit Und Recht*, have been publishing brief studies on the subject annually.²²⁷

But beyond this, we have also considered in our search for literature essays that make contributions from different approaches with a common evidence-based characteristic, which can be found with regard to both Latin America and Europe. Suggestive **case studies** exist concerning different issues.

A first area is related to **labour court performance** linked to different aspects. Firstly, with **judicial career incentives in Germany**,²²⁸ examining the impact of the organisation of the German labour court system on its performance. It is assumed that we are facing a kind of internal labour market whose main incentive is career opportunities. To test this hypothesis, data on the confirmation rate and productivity measure of nine Labour Court Appeals (*Landesarbeitsgericht*) during the period 1980-1998 are

²²⁶ See in addition: OIT, 2010. Estadísticas de los tribunales competentes en materia laboral en los países de Centroamérica y República Dominicana 2005-2008. San José: OIT. [pdf] Available at: <https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-san_jose/documents/publication/wcms_183769.pdf> (Accessed 06/09/2019).

²²⁷ Grotmann-Höfling, G., 2002. Prozesspraxis: Die Arbeitsgerichtsbarkeit 2000 im Lichte der Statistik. *Arbeit Und Recht*, 50(3), pp. 90–94.

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²²⁸ Schneider, M. R., 2005. Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal. *European Journal of Law and Economics*, 20(2), pp. 127–144.

analysed. The results show important differences only in productivity among Courts employing more judges with a PhD (more productive) and those employing more judges with higher ex ante promotion probabilities (less productive).

Secondly, the relation between **performance, resources and innovations**. An empirical analysis in **Brazil** using data from 24 labour courts during the period 2003-2013 indicates that performance improved primarily because of the adoption of innovations instead of changes in technical efficiency. The investment in training and court size are crucial to understand changes in courts efficiency.²²⁹

Or finally, how to measure the **results of the efficiency** of the judicial task in relation to the **effectiveness of rights in Italy**.²³⁰ It suggests that measurability of the outputs and cost predictability should not be the terms by which efficiency should be measured, but rather the effective protection of rights, which requires judges to manage the length of the proceeding adequately instead of obtaining results as soon as possible

An empirical analysis of the **French 2008 legal reform that reduced the number of labour courts** by a quarter shows how labour courts play a major role in the good functioning of the labour market.²³¹ There was a lower growth rate of job creation, job destruction and firm creation in those cities where the distance with the associated labour court increased. The consequences of this reform regarding the demand for litigation and the length of procedures have also been studied from an empirical perspective.²³² According to the results, the demand for litigation was reduced in the areas under study and duration seems to have increase in certain courts since 2011.

It has been noted that the **composition of employment** is affected by **labour court delays** in the Italian case,²³³ using data of the Italian workforce and the duration of labour procedures in different regions for the 2007-2010 period. The results show that some categories of workers (women, young and low-skilled people) are the most affected by labour court delays as they hinders their rate of occupation and increase their rate of inactivity, reducing their possibilities of obtaining permanent employment and triggering a shift from short- to long-term unemployment.

A case study on dismissal trials in **Mexico** analyses how **enforceability of labour regulations can be predicted**.²³⁴ Severance payments in case of unfair dismissals are often not collected, which is not the case when redundant workers were employed for more than seven years, given that this amount is higher. Information available to workers and the cost that they must assume to collect the award are key elements explaining the outcomes of lawsuits and used to create a theoretical model to predict these results.

Finally, the subjects of a last study to mention are the link between employment relation contexts and collective conflicts within the workplace and the individual conflicts solved in labour courts from a comparative perspective comprising UK, France, Italy, Portugal and Poland.²³⁵ Among its main results,

²²⁹ Sousa, M. de M., and Guimaraes, T. A., 2018. Resources, innovation and performance in labor courts in Brazil. *Revista de Administração Pública*, 52(3), pp. 486–506.

Focusing on innovation and how it is perceived by judges, see Sousa, M. de M., and Guimaraes, T. de A., 2017. The adoption of innovations in Brazilian labour courts from the perspective of judges and court managers. *Revista de Administração*, 52(1), pp. 103–113.

²³⁰ Tarquini, E., 2014. L'efficienza del giudice del lavoro tra effettività dei diritti e misurabilità dei risultati. *Lavoro e Diritto*, (2-3), pp. 547-552.

²³¹ Espinosa, R., Desrieux C. and Ferracci M., 2018. Labor Market and Access to Justice. *International Review of Law and Economics* (54), pp. 1-16.

²³² Espinosa, R., Desrieux, C. and Wan, H., 2017. Fewer courts, less justice? Evidence from the 2008 French reform of labor courts. *European Journal of Law and Economics*, 43(2), pp. 195-237.

²³³ Gianfreda, G., and Vallanti, G., 2015. Labour Courts delays and the composition of employment: Is labour encouraged or endangered by institutions? *LUISS Working Paper Series*.

²³⁴ Kaplan, D. S. and Sadka, J., 2008. Enforceability of Labor Law: Evidence from a Labor Court in Mexico. *Policy Research Working Paper*, No. 4483. World Bank, Washington, DC.

²³⁵ Gall, G. and Jefferys, S., 2011. Collective and individual conflicts in five European countries. *Employee Relations*, 33(6), pp. 670-687.

it should be noted that collective disputes were lower in the 2000s than before and that access to employment courts increased in all the countries analysed. Labour rights are less effectively enforced in Portugal and Poland, where very high levels of individual employment complaints are submitted to labour courts, or unions in France and Italy have a significant role supporting individuals taking cases to labour courts.

► Some tentative conclusions

This paper has tried to give an account of the state of the literature on labour courts since 2000 in Europe and Latin America. It is necessary to reiterate a prior warning on a certain bias in the results towards the literature of the Spanish case due to the methodology adopted. Among the most relevant bibliometric sources for retrieving the literature, we have included Latindex and SciELO, where Portuguese, Spanish and Latin American scientific production is available, because important publications in these geographical areas are not usually included in other more global indicators. As a consequence, the number of sources of information from this geographical area may be greater, which primarily occurs in the Spanish case, where the scientific production in the field of labour procedural law is superior to other contexts. Despite this, a number of points can be concluded.

A first conclusion, in general, is the relatively low interest in procedural issues in the labour law literature, if we compare it with the substantive aspects, which is predictable both from the European and Latin American scope.

Secondly, given the above limitation, any further research on access to labour justice should consider the following issues addressed so far in the literature.

From a comparative crosscutting approach, there are three main users of the labour justice system: workers, employers and administrative bodies, such as the labour authority, labour inspection or the social security administration. For this reason, it seems that any research that aims to deepen access to labour courts, should put the emphasis on those aspects that refer to them as users of the labour dispute resolution service offered by the administration of justice, as well as their procedural rights and how to safeguard these, with special consideration to workers from a process perspective as a mechanism for compliance with protective labour regulations. We mainly refer to the literature on access to legal proceedings (Chapter 3). This chapter contains perhaps the classic literature on accessing the labour process. Access to justice has always been related to the exhaustion of prior administrative appeal, the need for representation in legal proceedings, judicial fees or the guarantee of indemnity, which is so specific to the social jurisdictional sphere. There is other literature that may help to contextualise it.

On the one hand, we understand that it may be necessary to first approach the different systems to provide an overview of the situation of labour justice in Latin America and Europe. Bibliography on labour procedural systems in different geographical areas can be found in Chapters 1 and 2, with a special reference to the latest reforms, as well as the delimitation between social jurisdiction with respect to others and alternative mechanisms. Among other subjects, the literature has shown interest in the implementation of orality in the labour process or the response of systems to times of crisis (which leads to increases in unemployment proceedings or the necessary implications of bankruptcy proceedings on workers' rights).

On the other hand, there are also literature on specific aspects related to alternatives for regulating the labour proceedings from beginning to end and the possibilities of reviewing the labour judgement (Chapters 4 and 5). On these points, some institutions would merit a more detailed analysis, such as the writ of complaint, the processing of allegations, the practice of evidence, precautionary measures (which ensure compliance with the ruling) or access to constitutional and supranational mechanisms; among other things, access to the proceedings is not only access to the first instance, but also the possibility of review of the judicial response.

A less traditional view of the right to access labour justice can be also found in literature (Chapters 6 and 7). It is a matter of entrusting judges in the implementation of their functions, an active role in this field. The social judge is a major player in the implementation of social policies and one of these is to guarantee access to justice as a fundamental right, from all its manifestations. Finally, we would suggest exploring the scope and limits of judicial discretion in the application of rules in order to apply the conclusions to issues of access to social justice.

The analysis of the statistical data cited throughout the report, can be very useful in diagnosing the problems, which will allow more appropriate solutions to be proposed. Particularly significant, with respect to the European context, is the Dynamic database of the European Commission for the Efficiency of Justice.

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